Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES R. ALDRIDGE, SR., *et al.*,

Petitioners,

v.

GOODYEAR TIRE & RUBBER CO., INCORPORATED, an Ohio Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

HENRY EIGLES*
Attorney at Law
10729 Evening Wind Court
Columbia, Maryland 21044
(410) 730-1195

**Counsel of Record*

SYLVAN H. SACK
Attorney at Law
27 Brightside Avenue
Baltimore, Maryland 21208
(410) 484-1484

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

115pp

QUESTIONS PRESENTED FOR REVIEW

This case is a consolidated action of 66 cases brought by workers of a tire manufacturing plant for toxic injuries resulting from egregious chemical exposures in the plant. The district court refused to permit the petitioners to engage in any discovery before entering summary judgment on behalf of the respondent, and entered summary judgment when considering Rule 56(f) affidavits as Rule 56(e) affidavits.

Underlying the district court's refusal to allow any discovery is respondent's fraud perpetrated on the court in misrepresenting the factual record of a prior similar case, and further misrepresenting, repetitively, that the two cases were identical so to compel summary judgment without discovery. The 4th Circuit affirmed the district court's decision based on "the reasoning of the district court" without addressing any of the myriad issues raised by petitioners. Despite such lack of consideration by the panel, petitioners' petition for rehearing and rehearing en banc was denied.

1. Did the district court abuse the Federal Rules of Civil Procedure when refusing to allow petitioners discovery and entering summary judgment thereby denying petitioners due process of law?

2. Did respondent's counsel deliberately mislead the district and appellate courts to perpetrate a fraud on the courts so to foreclose discovery and litigation of the merits of this case?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, 66 workers, all individuals with individual cases consolidated under the name of *James R. Aldridge, Sr. et al.* were the plaintiffs before the district court and appellants before the 4th Circuit.

Respondent Goodyear Tire & Rubber Company was the defendant in the district court and appellee before the 4th Circuit.

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OPINIONS BELOW

1. The 4th Circuit issued an opinion on March 5, 2002, affirming the district court's decision solely based on the reasoning of the district court in denying discovery to plaintiffs and entering summary judgment on behalf of defendant. This opinion is unpublished and is reproduced at App. 1.

2. The district court issued a decision on remand on December 12, 2000 affirming its prior decision of summary judgment without allowing plaintiffs discovery while failing to comply with the mandate of the 4th Circuit's remand order. This opinion is published at *Aldridge v. Goodyear Tire & Rubber Company*, 198 F.R.D. 72 (D. Md. 2000). Opinion is reproduced at App. 11.

3. The 4th Circuit rendered a decision on July 27, 2000 remanding the case to the district court for consideration of allowing plaintiffs discovery, instructing that plaintiffs may seek discovery "responsive to their requests that have not previously been disclosed in one or the other of the [earlier] litigations." This opinion is published at *Aldridge v. Goodyear Tire & Rubber Company*, 223 F.3d 263 (4th Cir. 2000). Opinion is reproduced at App. 33.

4. The district court entered summary judgment on January 28, 1999. The decision is based on a misconception of the factual record of an earlier case that was misrepresented by respondent. And the district court held that discovery was foreclosed, premised on a non-existing legal principle of "sufficient commonality" between this case and the earlier case. The opinion is published at

Aldridge v. Goodyear Tire & Rubber Company, 34 F. Supp. 2d 1010 (D. Md. 1999). Opinion is reproduced at App. 40.

BASIS FOR JURISDICTION

Petitioners filed the subject petition for writ of certiorari to the Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. §1254. Petitioners' petition for rehearing and rehearing en banc before the 4th Circuit was denied on April 2, 2002. The time for filing the instant petition was extended by the Court to July 31, 2002.

RELEVANT PROVISIONS OF LAW INVOLVED

This case essentially involves the proper application of the Federal Rules of Civil Procedure.

Reproduced in the Appendix are:

Rule 11(b) and (c),
Rule 26(b)(1) and (c),
Rule 33(a) and (b),
Rule 34(a) and (b),
Rule 37(a),
Rule 56(e) and (f).

STATEMENT OF THE CASE

Petitioners' suits are diversity actions instituted pursuant to 28 U.S.C. §1332.

The *Aldridge* cases began in 1990. They were transferred to the multi-litigation panel in the district court for

the Eastern District of Pennsylvania, and remanded back to the district court for the District of Maryland in 1996.

Petitioners allege various toxic injuries to them resulting from particular chemical exposures to them in the course of their employment in a tire manufacturing plant in Cumberland, Maryland operated by the Kelly-Springfield Tire Manufacturing Co. ("Kelly"), a subsidiary of Goodyear. This case is the fourth of a series of groups of actions (each a consolidation) instituted by workers in the Kelly plant that was closed in 1987. The earlier cases, discussed *infra*, are the following: *Heinrich v. Goodyear Tire & Rubber Company*, 532 F.Supp. 1348 (D. Md. 1982); *McClelland v. Goodyear Tire & Rubber Company*, 929 F.2d 693 (4th Cir. 1991) (Table); *Jewell v. Goodyear Tire & Rubber Company* (D. Md., Civil No. S-89-3285) (incorporated the *McClelland* record by reference, was so disposed in like manner, and was joined in the *McClelland* 4th Circuit appeal).

In the first appeal the 4th Circuit vacated the district court's motion for summary judgment that was based upon a State workmen's compensation exclusivity remedies issue. The case was then remanded for consideration in light of recent Maryland case authority. *Aldridge v. Goodyear Tire & Rubber Company*, 145 F.3d 1323 (4th Cir. 1998) (Table) On remand following that appeal, respondent no longer pursued that ground and proceeded in an effort to establish summary judgment based on an absence of a showing of causation evidence. Two subsequent appeals to the 4th Circuit are involved in this petition.

a. Goodyear's Contractual Liability

Petitioners contend liability of respondent on grounds that Goodyear had contractual duties pursuant to §324A, Restatement (2d) Torts, to supply rubber, chemicals, other materials and industrial hygiene services to Kelly, and thus duties to promote health and safety requirements and practices in Kelly's plant that inured to the benefit of the third party petitioners.

The issue of Goodyear's duty to warn employees of Kelly, its subsidiary, of dangers associated with chemicals and other products supplied by Goodyear to Kelly (of its own manufacture or by its purchase from other suppliers) was considered in the first of these toxic tort cases in *Heinrich*. The court held that by its contractual agreements with Kelly, Goodyear had undertaken responsibility for services for the protection of Kelly's workers, and that §324A, Restatement (2d) of Torts is applicable. *Heinrich* was subsequently settled. The district court below refused to recognize that Goodyear had contractual agreements for industrial hygiene with Kelly. (App. 66)

b. Goodyear's Fraud in the Workplace

Goodyear not only failed to carry out these contractual duties, it deliberately hid, or caused to be hidden, information from petitioners as to their exposure to the toxic chemicals. Such information, too, was required to be disclosed to petitioners under the "Right to Know" provisions of law administered by the Occupational Health and Safety Administration (OSHA) and EPA. Goodyear engaged in deliberate deception when using code names for chemicals in order to not disclose the toxicity of chemicals

that it manufactured and supplied to Kelly, and chemicals procured from other suppliers for shipment to Kelly.

For example, an American Cyanamid letter dated January 5, 1971 to Goodyear states: "your sheet of 'Special Handling Instructions' dated 12 Aug 1970 on this product which is part of your company's Materials Acceptance Specifications for shipments of purchased goods. . . . *[Y]ou designate PHENAX as 'toxic dust' . . . 'but animal experiments indicate a high degree of toxicity.'*" (Emphasis added.)

While committing fraud on the workers when deliberately withholding disclosure of chemical exposure and toxicity, Goodyear also committed fraud on federal agencies when falsely presenting that it was complying with agency administration of federal law.

c. Goodyear's Fraud on the Court

Goodyear engaged in a scheme in the district court to obviate discovery so to cover-up Goodyear's fraudulent operations with Kelly. Fundamentally, Goodyear misrepresented to the district court that *McClelland* (also reflecting on the *Jewell* case that incorporated the *McClelland* record by reference) contained interrogatory expert testimony evidence on toxicity and chemical causation developed by plaintiffs in that case. And that that evidence was considered by the district court therein and found wanting when granting defendant's motion for summary judgment. The 4th Circuit affirmed on the basis that the record in *McClelland* contained no evidence of causation to defeat the motion for summary judgment. The district court below was thus wrongfully led to believe that the *McClelland* record evidence considered in *McClelland* included the

excluded interrogatory expert testimony evidence. Respondent proceeded on a transference premise: contending that because the cases are "virtually identical," only *McClelland* evidence could be applicable in *Aldridge*, and that summary judgment based on the state of the record evidence in *McClelland* (as misrepresented), affirmed by the 4th Circuit, must also be dispositive of *Aldridge*.

Contrary to representations of inclusion, counsel for defendant (who also are counsel in the instant case) deliberately caused the interrogatory expert testimony evidence to be excluded from consideration in *McClelland* – by a ruse of chicanery with plaintiff's counsel causing him not to timely file such evidence along with his opposition to defendant's motion for summary judgment. And at defendant counsel's strong urging in *McClelland*, the Magistrate Judge explicitly ruled that such evidence would not be considered on defendant's motion for summary judgment. Instead of the Magistrate Judge considering that evidence, plaintiffs' counsel at the hearing, referred to by the district court, was arguing that that evidence should be considered. (App. 63)

Respondent's counsel continued misrepresentations when presenting evidence of causation, taken out of context, that was submitted in a reply brief for the first time in support of the motion for summary judgment. Misrepresentations also were made to the district court and 4th Circuit as to the availability and existence of evidence, when seeking to foreclose discovery.[1]

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[1] Petitioners' Application No. 01A981 for extension of time to file the instant petition contains an extensive discussion of the fraud on the

(Continued on following page)

d. Differences of *Aldridge* and *McClelland* Complaints

In the district court respondent's counsel misrepresented, repetitively, like a drumbeat, that the *Aldridge* and *McClelland* cases were "virtually identical," that "the *Aldridge* complaints are almost verbatim copies of those filed on behalf of the *McClelland* plaintiffs," that "all material facts were established in *McClelland*," and "that Goodyear relies on the same record [as misrepresented] in moving for summary judgment in the instant case." Goodyear contended that "the identities among the cases made further discovery unnecessary."[2]

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court issue. The appendix to the Application lists six documents that have been filed and are pending for decision in the 4th Circuit, including a motion for the 4th Circuit to investigate the fraud, and a motion to recall and stay the mandate in *Aldridge*. The Clerk's office has informed petitioners' counsel that it would not be proper under the Supreme Court Rules for reproduction of these Application materials to be included in the Appendix to this petition. Petitioners therefore incorporate these materials by reference.

[2] At the outset of petitioners' filing of their cases in 1990, respondent's attorneys (James K. Archibald, Esq., litigation counsel, and Jonathan Dean, Esq., in-house counsel, who were also Goodyear's attorneys in *McClelland*) threatened Rule 11 sanctions in an attempt to intimidate and coerce petitioners' counsel to dismiss the *Aldridge* cases on grounds that they were the same as the *McClelland* cases, were controlled by the *McClelland* decision, and that there were not substantial grounds for filing these cases. When that threat was unsuccessful following petitioners' counsel's responsive detailed comparative analysis of the complaints in the two sets of cases demonstrating the extensive significant differences of the complaints, respondent's counsel then proceeded to advance the false commonality machination in the court proceedings. This was the beginning of respondent's fraudulent advocacy in *Aldridge*.

The *Aldridge* amended complaints, however, are much distinguishable from those in *McClelland*: on their face the *Aldridge* complaints have 39 pages, in contrast to 17 pages in the *McClelland* complaints. Myriad counts are contained in *Aldridge* of strict liability, fraud, concealment and misrepresentation, and breach of warranty that are not contained in *McClelland*. And the *Aldridge* complaints contain allegations that liability extends to Goodyear for 90% of the chemicals used by Kelly that were procured by Goodyear from other suppliers for Kelly's use although not manufactured by Goodyear. In contrast, liability in *McClelland* was alleged to extend only to 10% of the chemicals used by Kelly that were manufactured by Goodyear.

Apart from the fact that there are different plaintiffs and injuries personal to them in the instant case, the district court did not undertake a comparative analysis of the complaints in *Aldridge* and *McClelland*. Wholly in reliance on respondent's misrepresentations, the district court ruled, in the absence of res judicata or collateral estoppel, that there was "sufficient commonality" among the cases (App. 59), thus foreclosing discovery (App. 62, 64).

e. Denial of Petitioners' Rights to Discovery

When petitioners sought to avail themselves of rights to discovery when the case was first being considered by the district court for the causation issue, respondent contended to Judge Frederic N. Smalkin (newly assigned to *Aldridge* on the basis that he had decided *McClelland*) that *Aldridge* was "virtually identical" to *McClelland* while asserting that discovery was not necessary. The district court responded to petitioners' assertions of their right to discovery by stating: "I do not think it

would be worthwhile to have separate briefs on the issue of whether discovery is needed," and "the question of whether there is a need for discovery under *Celetox Corp. v. Catrett*, 477 U.S. 317, 326, n. 6 (1986) can be briefed at the same time as motions for summary judgment on the merits to be submitted by defendant."

Thus, relying on respondent's false representations, the district court did not permit discovery, and in place thereof petitioners were required by the district court to submit Rule 56(f) affidavits to show the need for discovery. But the affidavits had not then been considered inasmuch as the district court initially rendered summary judgment on a State workmen's compensation exclusivity remedies issue that was subsequently raised by respondent.

f. District Court Considered Rule 56(f) Affidavits As Rule 56(e) Affidavits

On remand following the first appeal, the case was reassigned to Senior Judge Alexander Harvey, II who gave no consideration to petitioners' Rule 56(f) affidavits as showing a need for discovery, and paradoxically considered such affidavits as Rule 56(e) affidavits as having been filed in opposition to respondent's motion for summary judgment relative to the issue of causation. When so considering such affidavits, the district court then wrongfully engaged in a *Daubert* analysis,[3] and during that process

[3] Examination of the underlying basis for reliability of expert testimony presented by affidavit in opposition to a motion for summary judgment must be undertaken by the district court when considering a motion for summary judgment. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

respondent misrepresented the evidence and credentials of petitioner's expert on toxicity to destroy his credibility. In advancing that position, respondent presented the misrepresented causation evidence for the first time in its reply brief in support of the motion for summary judgment; the motion itself rested solely on respondent's contention of commonality of the cases and record between *Aldridge* and *McClelland*. The district court refused petitioners' motion to strike such newly submitted evidence and raising of new issues in a reply brief – petitioners had no opportunity to respond. When rendering summary judgment on causation, the district court held that "the Court is satisfied that all of the challenged exhibits are relevant and admissible." (App. 72, n. 21)

Furthermore, in considering summary judgment, the district court improperly weighed evidence to render factual determinations when determining issues of causation. For example, the district court: engaged in consideration of the State law issue of "substantial contributing factor" for causation, and whether evidence of petitioners' purported expert testimony submitted by respondent fails to establish causation; made a determination of purported inconsistent statements contained in affidavits; and determined that Goodyear supplied only ten percent of petitioners' list of approximately two hundred potentially hazardous chemicals to which they were exposed. (App. 7, 55)

g. District Court's Failure to Follow 4th Circuit's Mandate to Permit Discovery

On the second appeal, the 4th Circuit vacated the second order of summary judgment and remanded the case

back to the district court[4] "with instructions [to] provide the Workers a *limited* opportunity for discovery so that they may seek those documents and information, and *only* those documents and information, responsive to their requests that have *not previously been disclosed* in one or the other of the litigations . . . (emphasis added.)" (App. 7) The district court failed to follow the mandate of the 4th Circuit when denying petitioners any discovery under the Federal Rules of Civil Procedure. The district court summarily denied any consideration to the fraud on the court issue raised by petitioners.

During the remand proceedings following the second appeal, respondent out-of-the-blue presented a motion for protective order for the district court to issue: the motion was filed on October 3, 2000 prior to a status conference scheduled for October 5, 2000. Petitioners had not been permitted to engage in discovery, thus to seek documents to which a protective order might apply.

Respondent contended that it needed the protective order to keep confidential cross-index documents of chemical code names to actual names of chemicals used in the manufacture of tires. Cross-index documents of chemical code names, however, are not trade secrets as they are not formulae of Goodyear's manufacturing processes. Respondent's affidavits submitted in support of the motion for protective order, moreover, did not support the contention that chemical code names were trade secrets.

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[4] On remand following the second appeal, Henry Eigles, Esq. entered an appearance on behalf of a petitioner, and for the first time raised the issue of fraud on the court by respondent's counsel. (App. 12)

Chemical code names were used to hide disclosure of names of chemicals that petitioners were exposed to. (*See* p. 5, *supra*) Without opportunity to respond to the motion, except orally at the status conference, the district court issued the protective order at the status conference, and thereafter summarily denied petitioners' motion for reconsideration of the protective order.

Yet, even as to the cross-index documents, Goodyear abused the protective order when it filed under seal 4500 pages notwithstanding that but 300 pages related to cross-index documents. The clear objective of such massive document filing was to further thwart petitioners' right to discovery. The district court accepted respondent's wrongful assertion that these documents satisfied Appellants' need for discovery (App. 12, 25, n. 5), as if respondent was responding to a Rule 34 motion for production of documents.

The district court, moreover, circumscribed the 4th Circuit's remand order by limiting any consideration for potential discovery to respondent's original Rule 56(f) affidavits. This was limited by the district court, as the 4th Circuit noted (App. 8), to "discovery requests 'previously made'" (as if petitioners had previously engaged in discovery under the Federal Rules of Civil Procedure), instead of the district court allowing discovery "responsive to Appellants' requests."

Moreover, respondent had not identified the documents and information previously disclosed in the earlier litigations, and, consequently, there is no record of them in these proceedings – such discovery on which basis the district court held that no discovery by petitioners is necessary. Petitioners maintained in the district court and

before the 4th Circuit that the only appropriate way to identify documents and information previously made available in the earlier litigations is for petitioners to engage in discovery and for respondent to object to requests for production on that ground and/or file a motion for protective order, thence for such issues to be decided by the district court. The district court refused to entertain such proceedings.

h. Goodyear's Continued Misrepresentations Before the 4th Circuit

Respondent continued its misrepresentations before the 4th Circuit during oral argument on January 23, 2002. Respondent contended that proof of causation could only be based on the 10% of chemicals manufactured by Goodyear used in the Kelly plant – notwithstanding that unlike the complaints in *McClelland*, the *Aldridge* complaints allege liability also for the other 90% of chemicals used by Kelly from other suppliers that were procured by Goodyear for Kelly's use, and toxicity of such chemicals to which petitioners were exposed without their knowledge. Respondent contended lack of existence of health records of Goodyear workers notwithstanding that Goodyear is a continuing health insurer of petitioners. Respondent contended non-existence of records of mortality and morbidity rates when Goodyear has undertaken studies of such statistics. Petitioners' Rule 56(f) affidavits demonstrate the need to discover death certificates as a basis for determining epidemiological causation statistics on death excesses for each of the diseases of deceased workers that were causes of their deaths.

i. District Court's Summary Judgment Affirmed by the 4th Circuit

The district court issued an opinion again denying discovery and affirmed its earlier issuance of summary judgment. In the face of the district court's failure to follow the mandate of the 4th Circuit to allow limited discovery (excluding discovery made available in the earlier litigations), the 4th Circuit in its decision on the third appeal did not address the issues raised by petitioners. (App. 91) The 4th Circuit merely affirmed the district court's summary judgment based on "the reasoning of the district court."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The district court proceedings in this toxic injury case have been a travesty of justice to foreclose petitioners of their rights to discovery, and to wrongfully foreclose their causes of action in the federal judicial system.

The district court was complicit with respondent when refusing to permit petitioners discovery under the Federal Rules of Civil Procedure – to the extent of not complying with the mandate of the 4th Circuit that instructed the district court to permit limited discovery (excluding discovery made available in the earlier litigations). And, too, the district court issued a protective order to allow respondent a false cover of confidentiality for documents (submitted purportedly to show no need for discovery) when petitioners were denied the right to discovery. Without discussion of the issues raised by petitioners, the 4th Circuit concluded its decision, recounting the district

court's failure to allow discovery, by affirming the district court's summary judgment based on "the reasoning of the district court." In doing so, the 4th Circuit, in effect, deferred further review of the district court proceedings to this Court.

When placing reliance on the integrity of these officers of the court, the district court incorporated its erroneous conception of the *McClelland* record into its decision on summary judgment and so accepted respondent's misrepresentations – the interrogatory expert opinion evidence as having been included in the *McClelland* record that, contrarily, they caused to be excluded from the *McClelland* evidentiary record. Integral to respondent's fraudulent scheme were its repetitive misrepresentations of "virtually identical" of *Aldridge* with *McClelland*: complaints, available discovery, material facts, to foreclose discovery in *Aldridge* – which the district court likewise relied upon when it held that there was "sufficient commonality" between the cases, notwithstanding that the complaints in the two sets of cases are strikingly different. Respondent's misrepresentations continued unabated before the district court and the 4th Circuit when presenting the nature and existence of evidence in the case to demonstrate lack of causation, and as to discovery falsely describing the availability and existence of evidence.

When considering *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 442 U.S. 238 (1944),[5] the court in *Great*

[5] "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently

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Coastal Express, Inc. v. Intern'l Bhd. Of Teamsters, 675 F.3d 1349, 1356 (4th Cir. 1982) also looked to Moore's Federal Practice treatise.

> Professor Moore's suggested formulation [of fraud on the court] is often cited . . .
>
> > "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication . . . ."
> >
> > 7 Moore's Federal Practice §60.33 at 515 (1971); see also *Martina Theatre Corp. v. Schine Chain Theatres*, 278 F.2d 798 (2d Cir. 1960) (following Moore).

As in *Hazel-Atlas*, the fraud in this case has been perpetrated by attorneys, officers of the court, rather than a party as occurred in *Great Coastal Express*, as so distinguished. The fraud perpetrated by respondent's counsel was systemic, and pointedly designed so that "the judicial machinery [could] not perform in the usual manner its impartial task of adjudging" this case.

At the outset of the proceedings related to adjudication of petitioners' cases, when denying discovery the

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be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. *The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.*" (Emphasis added.) *Id.* at 246.

district court (Judge Smalkin) flouted *Celetox*, and the 4th Circuit's explication of that case: "'Summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.'" *Evans v. Technologies Applications & Service Company*, 80 F.3d 954, 961 (4th Cir. 1994). The district court, instead, in misreading *Celetox* required petitioners to file Rule 56(f) affidavits that it, thereafter, did not address as to the need for discovery. That petitioners were "railroaded," as referred to by Justice Rehnquist in *Celetox* is an apt phrase. On later reassignment of the case, the district court (Judge Harvey) likewise did not consider them for discovery.

And the district court proceedings were utterly bizarre when the district court proceeded to consider petitioners' Rule 56(f) affidavits as Rule 56(e) affidavits when considering respondent's motion for summary judgment. And, too, the district court relied on respondent's misrepresentations as to lack of expert testimony evidence on causation to support opposition to summary judgment – an issue and documents first filed with its reply brief that the district court refused to strike.

Rule 56(f) plainly provides that a party opposing a motion for summary judgment may present by affidavit that it "cannot for reasons stated present by [Rule 56(e)] affidavit facts essential to justify the party's opposition." It is clearly recognized that the procedure of submitting Rule 56(f) affidavits is available if the non-movant cannot produce an affidavit containing facts to create a genuine issue of material fact in opposition to summary judgment, thus to establish the need to conduct discovery *prior* to the court ruling on the motion for summary judgment. *Simas*

v. First Citizens Federal Credit Union, 170 F.3d 37, 46, n. 4 (1st Cir. 1999)

In sum, the district court proceedings were deliberately unlawful. The district court was complicit with respondent in denying petitioners their right to discovery and in wrongfully foreclosing their causes of actions. Following the earlier *Heinrich*, *McClelland*, and *Jewell* cases, seemingly, the objective of respondent in these unlawful proceedings was to foreclose these and any future toxic injury suits by workers in the Kelly plant against The Goodyear Tire & Rubber Company.

CONCLUSION

This Court should grant the writ and reverse the judgment below. Petitioners are entitled to discovery under the Federal Rules of Civil Procedure, and to prove their claims in a fair and impartial forum.

Respectfully submitted,

HENRY EIGLES*
Attorney at Law
10729 Evening Wind Court
Columbia, Maryland 21044
(410) 730-1195

**Counsel of Record*

SYLVAN H. SACK
Attorney at Law
27 Brightside Avenue
Baltimore, Maryland 21208
(410) 484-1484

Counsel for Petitioners

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JAMES R. ALDRIDGE, SR.; MARGARET ALDRIDGE; HARRY W. ATKINSON; LOIS V. ATKINSON; WESLEY B. BARTLETT; ANNA M. BARTLETT; LEONARD BEARD, SR.; THERESA BEARD; CARROLL E. BROADWATER; MARLENE BROADWATER; THOMAS HENRY BROWN; BETTYLOU BROWN; ESTON C. CHAMP; PAUL H. CORDIAL; EARLENE L. CORDIAL; STANLEY W. CORLEY; C. LOUISE CORLEY; DONALD A. D'ATRI; SHIRLEY D'ATRI; JEAN C. GLASS; RAYMOND L. HAINES; MARY CATHERINE HAINES; ERNEST M. HOLT; ANNA MYRTLE HOLT; JUNIOR A. HOTT; ROXALYN HOTT; CAROL G. HUFFMAN; ROBERT M. ISER; WANDA L. ISER; DONALD JOHNSON; MARY ELLEN JOHNSON; DONALD LARKE; JUDY LARKE; IRVIN E. LOWERY; ADA L. LOWERY; WILLIAM R. MCCOY; LOUISE T. MCCOY; GEORGE V. MCKENZIE; DOROTHY E. MCKENZIE; WILLIAM J. MCKENZIE; MARTHA MCKENZIE; JAMES B. MILLS; ANN LOUISE MILLS; ROBERT MITTER; MARY LOUISE MITTER; JOHN E. MONAHAN; M. CAROLYN MONAHAN; RUSSELL C. MORGAN; LOUISE MORGAN; ARTHUR L. NEDER; JUNE E. NEDER; EDITH G. NORRIS, individually and in her capacity as personal representative of the	No. 00-2588

estate of the deceased, David P. Norris; JACK E. RITCHEY; HELEN J. RITCHEY; PAUL A. SHOOK; GENEVIEVE E. SHOOK; GERALD D. SIMMONS; BARBARA SIMMONS; WILLIAM R. SPENCER; ELVA P. SPENCER; JOSEPH R. TAYLOR; ANNA K. TAYLOR; RICHARD F. WEESE; HAZEL M. WEESE; RAYMOND E. VINCI; SHIRLEY R. VINCI; EARL A. WINTERS; BETTY M. WINTERS; WILLIAM P. ZIMMERMAN; PHYLLIS ZIMMERMAN; ROBERT W. HAISLIP, as Personal Representative of the estate of his father Robert W. Haislip; NELLIE MAE MILLER; BARBARA A. FRIDINGER, in her capacity as personal representative of the estate of the deceased. Percy R. Miller; RONALD E. PORTER; RUTH M. DAY; PHYLLIS R. FROST, in her capacity as personal representative of the estate of Frank C. Day, deceased; MARY S. LANGHAM, individually and in her capacity as personal representative of the estate of George E. Langham, deceased; ELMER L. KROLL; DORIS R. KROLL; PRISCILLA TETER, individually and in her capacity as personal representative of the deceased, Brook Teter; MURIEL R. SCHRAMM, individually and in her capacity as personal representative of the estate of Calvin C. Schramm; JESSIE SIMMONS, individually and in her capacity as personal representative of the estate of the deceased, LEONARD T. SIMMONS;

KATHLEEN S. SIRBAUGH, in her capacity as personal representative of the estate of Arlan Eugene Sirbaugh, deceased; JACOB LOAR; SARAH J. LOAR; HARRY F. PIPER; GENEVIEVE PIPER; LEROY ROBERTSON; ETHEL H. ROBERTSON; ALBERT D. STEWART; BETTY STEWART; LOIS SCHADT; MILFORD G. WILSON; DOROTHY M. WILSON; EVELYN V. BUSER, individually and in her capacity as personal representative of the estate of Theodore U. Buser, deceased; VIOLET G. GRAY, individually and in her capacity as personal representative of the estate of Richard R. Gray, deceased; YOLAND T. TACCINO; THOMAS RODGER TACCINO, personal representative of the estate of Edmund Joseph Taccino, deceased; ANNA M. COLE, personal representative of the estate of Charles B. Cole, deceased; MARY KATHLEEN JENKINS, individually and in her capacity as personal representative of the estate of Richard Toll Jenkins, deceased; JEREMY EDWARD, surviving minor grandchild of Richard Toll Jenkins, deceased to the use of Mary Kathleen Jenkins, surviving spouse of Richard Toll Jenkins, deceased; DONALD J. FOLK; ARTHUR C. TICHNELL; CARRIE A. TICHNELL; WANEDA C. BRIDGES, individually and in her capacity as personal representative of the estate of Nevin H. Bridges,

deceased; GILBERT L. ZIMMERMAN; REBECCA ZIMMERMAN; LEROY E. GROSS; CAROL M. GROSS; LEONARD D. WHITE; GLADYS FAY WHITE; EUGENE L. ZIMMERMAN, JR.; PHYLLIS M. ZIMMERMAN; WEBSTER BRUCE LONG, III; LEONA PHARES LONG; LOUIS E. SCHADT, JR.; TERRY TRESSLER; MARGARET TRESSLER, as Personal Representatives of the estate of Robert C. Huffman; RAYMOND L. CHAMP, as personal representative of the estate of Elsie Champ, deceased; CAROLYN A. WAGNER, as personal representative of the estate of Richard H. Glass, deceased; JEANE R. KENNELL, as personal representative of the estate of Richard H. Glass, deceased; LOIS J. SCHADT, as personal representative of the estate of Louis E. Schadt, deceased; CYNTHIA JANE COLLINS, as Personal Representative of the estates of Betty H. Stewart and Albert D. Stewart; VICKIE A. HEBB, as Personal Representative of the estates of Betty H. Stewart and Albert D. Stewart,

Plaintiffs-Appellants,

and

DAVID P. NORRIS; PERCY MILLER,

Plaintiffs,

v.

GOODYEAR TIRE & RUBBER COMPANY, INCORPORATED, an Ohio Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey II, Senior District Judge. (CA-90-140-H, CA-90-141-S, CA-90-142-K, CA-90-143-HAR, CA-90-145, CA-90-146, CA-90-147-S, CA-90-148-HAR, CA-90-149-MJG, CA-90-150, CA-90-151-MJG, CA-90-152-H, CA-90-153-S, CA-90-154-S, CA-90-155-HAR, CA-90-156-MJG, CA-90-157, CA-90-158-S, CA-90-159-S, CA-90-160-S, CA-90-161-HAR, CA-90-162-S, CA-90-163, CA-90-164-H, CA-90-165-S, CA-90-166-K, CA-90-167-HAR, CA-90-168-MJG, CA-90-169, CA-90-170, CA-90-171-S, CA-90-172-HAR, CA-90-173-MJG, CA-90-174, CA-90-175-S, CA-90-176-H, CA-90-177-S, CA-90-178-K, CA-90-179-MJG, CA-90-180-MJG, CA-90-181-S, CA-90-182-K, CA-90-809, CA-90-887-MJG, CA-90-2331-WN, CA-90-2339-WN, CA-91-953-HAR, CA-91-3369, CA-91-3370, CA-91-3371, CA-91-3372, CA-91-3373, CA-91-3374, CA-91-3375, CA-91-3376, CA-91-3377, CA-91-3378, CA-91-3379, CA-92-3679, CA-92-3680, CA-92-3681, CA-92-3682, CA-95-1910-MJG, CA-95-1988, CA-95-1989, CA-96-1990).

Argued: Jan. 23, 2002

Decided: March 5, 2002

Before LUTTIG, MICHAEL, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Henry Eigles, Columbia, Maryland, for Appellants. Joseph Carlton Wich, Jr., VENABLE, BAETJER & HOWARD, L.L.P., Towson, Maryland, for Appellee. **ON BRIEF:** Sylvan H. Sack, Baltimore, Maryland, for Appellants. James K. Archibald, Mitchell Y. Mirviss, VENABLE, BAETJER & HOWARD, L.L.P., Towson, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants are former employees of Kelly-Springfield Tire Company who allege that they became ill from exposure to toxic chemicals that Goodyear supplied to Kelly-Springfield. In three prior lawsuits, other groups of former Kelly-Springfield workers brought similar claims against Goodyear. *See Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348 (D. Md. 1982); *McClelland v. Goodyear Tire & Rubber Co.*, 735 F. Supp. 172 (D. Md. 1990); *Jewell v. Goodyear Tire & Rubber Co.*, Civ. No. S-89-3235. *Heinrich* settled, but Goodyear prevailed on summary judgment in *McClelland* and *Jewell* because the plaintiffs were unable to show proximate causation. This Court affirmed both *McClelland* and *Jewell* on appeal.

In this litigation, the district court likewise found that plaintiffs failed to show sufficient evidence of proximate causation and granted summary judgment to Goodyear. *See Aldridge v. Goodyear Tire & Rubber Co.*, 34 F. Supp.

2d 1010, 1017 (D. Md. 1999) (*Aldridge III*). Goodyear supplied only ten percent of the potentially hazardous chemicals to which plaintiffs were exposed. *Id.* at 1017. Moreover, plaintiffs failed to produce evidence that a "particular, identifiable chemical supplied by Goodyear was a legal cause of their injuries." *Id.* at 1019. Finally, the district court rejected the affidavits of plaintiffs' expert witnesses as too vague and conclusory, lacking reliance on scientific research or literature, and as failing to address possible alternative causes of plaintiffs' illnesses. *Id.* at 1024. The district court, however, did not permit the *Aldridge* plaintiffs *any* discovery, but relied on the discovery produced in the previous litigation against Goodyear.

This court vacated the district court's summary judgment order and remanded "with instructions [to] provide the Workers a *limited* opportunity for discovery so that they may seek those documents and information and *only* those documents and information, responsive to their requests that have *not previously been disclosed* in one or the other of the litigations." *Aldridge v. Goodyear Tire & Rubber Co.*, 223 F.3d 263, 266 (4th Cir. 2000) (*Aldridge IV*) (emphasis added).

On remand, the district court held that the employees were *still* not entitled to any discovery. *See Aldridge v. Goodyear Tire & Rubber Co.*, 198 F.R.D. 72 (D. Md. 2000) (*Aldridge V*, the decision from which appellants appeal). The district court noted that plaintiffs failed to identify "very specifically that very small amount of information that they believe might exist," as we stated in *Aldridge IV*. *Id.* at 76. Moreover, the discovery requested by plaintiffs either: 1) was duplicative, 2) had never been presented as a request to the district court before, or 3) had no relevance to the critical issue of causation. *Id.*

In March of 1997, in response to Goodyear's initial motion for summary judgment, the plaintiffs had submitted six affidavits under Rule 56(f) requesting further discovery. In *Aldridge V,* the district court refused to consider any new requests for discovery, and considered only the discovery requests "previously made" in plaintiffs' six Rule 56(f) affidavits. *See* 198 F.R.D. at 78. The district court concluded that four of the six affidavits requested information available in the discovery undertaken in *Heinrich* and *McClelland. Id.* at 78-79. As to the fifth and sixth affidavits, the district noted "five possible areas" that may relate to discovery not previously available to plaintiffs, but ultimately concluded that none of these areas was relevant to the dispositive issue of causation. *Id.* at 79-81. Accordingly, the district court denied further discovery and reinstated its grant of summary judgment from *Aldridge III.*

Having had the benefit of oral argument and the parties' briefs, we conclude that the district court correctly decided the issues before it. Accordingly, we affirm on the reasoning of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES R. ALDRIDGE, SR., et al.	*	
Plaintiffs	*	CIVIL NO. H-90-140 (Consolidated)
vs.	*	
THE GOODYEAR TIRE & RUBBER COMPANY	*	
Defendant	*	

* * * * * o0o * * * * *

ORDER

For the reasons stated in the Court's Opinion of today, it is this 12th day of December, 2000 by the United States District Court for the District of Maryland,

ORDERED:

1. That Plaintiffs' Motion for Leave to Conduct Further Discovery Under Rule 26 is hereby denied;

2. That this Court hereby reaffirms its Opinion of January 28, 1999 granting the Motion for Summary Judgment of defendant The Goodyear Tire and Rubber Company; and

3. That this Court hereby reaffirms its Final Judgment Order of January 28, 1999, entering judgment in favor of defendant The

Goodyear Tire and Rubber Company in each of these 66 cases, with costs.

/s/ Alexander [Illegible] II
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF MARYLAND

JAMES R. ALDRIDGE, et al.,	*	
	*	CIVIL NO. H-90-140
Plaintiffs,	*	(Consolidated)
	*	
vs.	*	
	*	
THE GOODYEAR TIRE & RUBBER COMPANY,	*	
	*	
Defendant.	*	

G. Macy Nelson, Towson, Maryland for plaintiffs.

James K. Archibald, Joseph C. Wich, Jr. and Venable, Baetjer and Howard, Baltimore, Maryland for defendant.

HARVEY, Senior Judge

DATED: December 12, 2000

In its Opinion of January 28, 1999, this Court granted the motion for summary judgment of defendant Goodyear Tire & Rubber Company ("Goodyear"). *Aldridge v. Goodyear Tire & Rubber Company,* 34 F.Supp.2d 1010 (D. Md. 1999) (*Aldridge II*). Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit which remanded the case for further proceedings. *Aldridge v. Goodyear Tire & Rubber Co., Inc.,* 223 F.3d 263 (4th Cir. 2000) (*Aldridge III*). In its Opinion, the Fourth Circuit did not address the substantive issues raised by plaintiffs in their appeal. Rather, the Fourth Circuit directed this Court to reconsider on remand whether the plaintiffs were entitled to limited discovery before responding to Goodyear's motion for summary judgment.

Following remand, this Court met with counsel and set a schedule for the filing of and the briefing of the

question whether plaintiffs should have been permitted to engage in further discovery or whether this Court was justified in denying discovery altogether before plaintiffs responded to Goodyear's motion for summary judgment. *Aldridge III,* 223 F.3d at 266. G. Macy Nelson, Esq., the attorney for the plaintiffs who had represented them both in this Court and in plaintiffs' appeal to the Fourth Circuit, duly filed a "Motion for Leave to Conduct Further Discovery under Rule 26."[1] In support of his motion, Mr. Nelson submitted a memorandum of law and various exhibits. Counsel for defendant Goodyear filed an opposition to plaintiffs' motion, together with several affidavits and other exhibits. After this Court entered a Protective Order, defendant Goodyear submitted several thousand pages of documents which it contends support its position that adequate discovery had been provided to plaintiffs before they filed their opposition to Goodyear's motion for summary judgment. Mr. Nelson in turn has filed a reply to Goodyear's opposition. A hearing on plaintiffs' motion was held in open court on October 27, 2000. At that hearing, the Court requested counsel to file supplementary briefs which have now been received.

The Court has now had an opportunity to review the pleadings, memoranda and exhibits which have been filed by the parties following remand. In particular, the Court has carefully examined the documents which have been submitted by the parties and which relate to the question

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[1] Following remand, Henry Eigles, Esq. entered his appearance for one of the plaintiffs and filed a separate motion for leave of court to conduct discovery. That motion was denied at the outset of the hearing held on October 27, 2000.

whether this Court was justified in previously denying plaintiffs the right to undertake further discovery before opposing defendant's motion for summary judgment.

For the reasons stated herein, plaintiffs' motion for leave to conduct further discovery will be denied.

I

Background

This consolidated case has had a long and tortuous history. In its prior Opinion, this Court discussed in some detail the background facts and the prior related proceedings. *See Aldridge II,* 34 F.Supp.2d at 1013-15. That discussion will merely be summarized here. Suffice it to say, plaintiffs are the fourth group of employees of Kelly-Springfield Tire Company ("Kelly-Springfield") who have sought damages from Goodyear under various tort theories for occupational diseases contracted by them during the course of their employment with Kelly-Springfield. *See Heinrich v. Goodyear Tire & Rubber Company,* 532 F.Supp. 1348 (D. Md. 1982); *McClelland v. Goodyear Tire & Rubber Company,* 735 F.Supp. 172 (D. Md. 1990) (*McClelland I*); *Jewell v. Goodyear Tire & Rubber Co.,* Civil No. S-89-3235.

The *Heinrich* case was settled after the parties had engaged in extensive discovery. In both *McClelland I* and *Jewell,* Goodyear's motions for summary judgment were granted on the ground that plaintiffs could not prove causation by a preponderance of the evidence. This Court's rulings in *McClelland I* and in *Jewell* were affirmed on appeal by the Fourth Circuit. *McClelland v. Goodyear Tire & Rubber Co.,* 929 F.2d 693 (Table), 1991 WL 38700 (4th Cir.1991) (*McClelland II*). In *Aldridge II,* this Court granted Goodyear's motion for summary judgment on the

ground that plaintiffs had failed to produce evidence that a "particular, identifiable chemical supplied by Goodyear" was the legal cause of their injuries. 34 F.Supp.2d at 1020; *McClelland I,* 735 F.Supp. at 174; *McClelland II,* 1991 WL 38700 at *3.

In opposing Goodyear's motion for summary judgment in this case, plaintiffs argued, *inter alia,* that pursuant to Rules 56(e) and 56(f), they should have been permitted to conduct further discovery before responding to Goodyear's motion. That request was denied by this Court on the ground that a very large amount of discovery had previously been undertaken in the *Heinrich* and *McClelland I* litigations, that all this discovery was available for counsel in this case and that there was little new information of any consequence which could be revealed by way of additional discovery. *Aldridge II,* 34 F.Supp.2d at 1020-21. In remanding this case, the Fourth Circuit directed this Court to reconsider its denial of discovery to the plaintiffs. *Aldridge III,* 223 F.3d at 266.

In its remand Opinion, the Fourth Circuit stated that this Court should reconsider whether the plaintiffs "are entitled to limited discovery, . . . " *Id.* at 265. The Fourth Circuit determined that, on the record before it, it was unclear whether the documents heretofore produced in the "combined litigations" are "fully responsive to all of the individual requests by these plaintiffs." *Id.* at 266. Because of this uncertainty, the case was remanded with instructions that this Court provide the plaintiffs with "a limited opportunity for discovery" so that they might seek those documents and information "and only those documents and information" responsive to their requests that have not previously been disclosed in one or the other of the litigations. *Id.* In remanding, the Fourth Circuit stated

that, "we do not intend to imply that the workers are entitled to duplicative discovery," but the Court anticipated "that any permitted discovery will be quite limited." The Court further stated (*Id.*):

> Without attempting in any way to limit the district court's prerogative to supervise discovery, we would expect that the workers would be required to identify very specifically *that very small amount of information* that they believe might exist and that Goodyear would be required to respond only to *that limited discovery request.* (Emphasis added).

In instructing this Court to review the parties' submissions on remand and determine whether plaintiffs were entitled to further discovery, the Fourth Circuit indicated that it was not necessarily directing this Court to order defendant Goodyear to provide additional discovery to plaintiffs. The Court noted that it "may well be that the district court was fully justified in denying further discovery altogether." *Id.* at 266. Following its consideration of any "circumscribed discovery," this Court was directed to assess whether summary judgment is appropriate in this case so that the Fourth Circuit Court might be in a better position to review this Court's conclusion. *Id.* at 267.

II

Evidentiary Materials Previously Before the Court

To place the discovery dispute in this long pending case in proper perspective, the Court will, at the outset, summarize the evidentiary materials which were before it

and which were considered by the Court when it denied plaintiffs' request that they be permitted to engage in further discovery. Defendant Goodyear filed its motion for summary judgment on December 13, 1996. In support of its motion, Goodyear had submitted voluminous exhibits, including documents, deposition excerpts and affidavits. All of these evidentiary materials were available to plaintiffs as a result of discovery undertaken in the *Heinrich* and *McClelland* cases.

On February 3, 1997, plaintiffs filed their opposition to Goodyear's motion for summary judgment, together with Exhibits Nos. 1 through 8 and so-called "Master Exhibits" Nos. 1 through 13. On February 19, 1997, plaintiffs filed "Master Exhibit File, Volume II," and on March 5, 1997, they filed "Master Exhibit File, Volume III." The numerous exhibits submitted by plaintiffs in Volumes I, II and III of its Master Exhibit Files included voluminous documents produced in the *Heinrich* and *McClelland* litigations. Included, *inter alia,* were an eleven page Chemical Toxology Report, a 163-page alphabetical listing of chemicals used by Kelly-Springfield, a 100-page summary of chemicals used in the Mill Room and an affidavit of Dr. Donohue discussing the properties of chemicals present in the Cumberland plant. [2]

In his Memorandum Opinion dated March 5, 1997, Judge Smalkin granted Goodyear's motion for summary

[2] In addition, fourteen separate oppositions of individual plaintiffs were filed in the separate *Aldridge* case and in some of the other related cases brought by these individual plaintiffs. Those materials were also a part of the summary judgment record before the undersigned when he denied plaintiffs' request to conduct further discovery.

judgment.[3] However, Judge Smalkin did not address the causation issue raised in Goodyear's motion but chose to apply the alternative theory previously discussed by him in *McClelland I. See* 735 F.Supp. at 175-176. He accordingly held that the exclusivity bar of Maryland's worker's compensation law compelled the granting of summary judgment in favor of defendant Goodyear in all of these consolidated cases. (Memorandum Opinion, slip op. at 5-6). Plaintiffs appealed to the Fourth Circuit which, following Goodyear's concession that the order awarding summary judgment in its favor should be reconsidered in light of a recent decision of the Maryland Court of Appeals, vacated the judgments entered and remanded this case to this Court. *Aldridge v. Goodyear Tire and Rubber Co.,* 145 F.3d 1323, 1998 WL 230986 (4th Cir. May 11, 1998) (*Aldridge I*).

Following the *Aldridge I* remand, this case was reassigned to the undersigned judge. A conference with counsel was held on August 27, 1998. At that conference, plaintiffs' attorney requested leave to undertake further discovery and to file an additional brief in opposition to Goodyear's pending motion for summary judgment. The Court denied plaintiffs' request to undertake further discovery but permitted plaintiffs to file an additional brief and additional supporting exhibits in opposition to Goodyear's motion. Because of the many plaintiffs and the various issues raised by Goodyear's motion, plaintiffs were permitted to file an additional memorandum exceeding the 50-page limit established by Local Rule 105.3. Counsel for

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[3] Plaintiffs' cross-motion for summary judgment was denied in that Opinion.

plaintiffs were advised at the conference held on August 27, 1998 that they were free to argue, both in their memorandum and at the hearing to be held on Goodyear's motion for summary judgment, that plaintiffs should be allowed to conduct further discovery before the Court ruled on Goodyear's motion. The Court indicated that, after plaintiffs had filed their supplementary materials, the Court would be in a better position to rule on their request that they be permitted to conduct further discovery.

Plaintiffs' supplemental opposition brief was some 299 pages in length. Together with that opposition, plaintiff submitted one volume of reports of its experts, one volume of affidavits and medical histories and four additional volumes of exhibits. Thousands of pages of documents obtained during discovery in the *Heinrich* and *McClelland* cases, as well as during discovery in this case, were included. There were affidavits of plaintiffs and excerpts from the depositions of several plaintiffs taken in this case. There were chemical exposure summaries for various plaintiffs, identifying chemicals which cause heart disease and chemicals which cause cancer. There was a breakdown of the various departments and locations in the Cumberland plant where plaintiffs had worked and a listing of the chemicals to which plaintiffs had been exposed in those locations. Included also were affidavits of numerous plaintiffs identifying the departments where they worked, the chemicals to which they had been exposed and their health conditions. The departments in which the plaintiffs worked included, *inter alia,* the Final Finish Department, the Curing Department, the Mill Room, the Calendar Department, the Tube Room, the Tread Room, the Stock

Preparation Department and the Maintenance Department.

Following its review of the voluminous evidentiary materials filed by defendant Goodyear in support of its motion and by plaintiffs in support of its two separate oppositions to that motion, this Court concluded in its earlier Opinion that plaintiffs were not entitled to conduct additional discovery before the Court ruled on Goodyear's motion for summary judgment. *Aldridge II,* 34 F.Supp.2d at 1020. The critical issue presented by defendant's motion was whether plaintiffs had produced evidence that "a particular identifiable chemical supplied by Goodyear" was a legal cause of their injuries. *McClelland I,* 735 F.Supp. at 174, *McClelland II,* 1991 WL 38700 at *3. After considering the discovery undertaken in *Heinrich* and that undertaken in *McClelland I,* all of which had been made available to plaintiffs, as well as the discovery which had earlier been conducted by plaintiffs in this case, this Court concluded that additional discovery could not reasonably be expected to add to the record here material evidence which would be relevant to the dispositive causation issue. Plaintiffs' request to undertake additional discovery was accordingly denied. *Aldridge II,* 34 F.Supp.2d at 1021.

Pursuant to the Fourth Circuit's remand of the case, the Court will now undertake to reexamine that decision in the light of the supplemented record before it.

III

Plaintiffs' Motion for Leave To Conduct Discovery

In his zealous effort to avoid in this case the adverse result which this Court concluded was required by the

rulings made by this Court and the Fourth Circuit in the *McClelland* cases, counsel for plaintiffs has paid little heed to what the Fourth Circuit has instructed counsel and this Court to do following remand. Counsel for plaintiffs has not specifically identified the small amount of relevant information believed to exist. Rather, plaintiffs have now sought in general terms an abundance of information, most of which has little relevance to the causation issue presented in the case. Counsel for plaintiffs here contend that they are entitled to discovery materials whether or not those materials were previously requested by plaintiffs before this Court granted summary judgment in favor of defendant Goodyear.

(a)

Discovery Now Sought By Plaintiffs

In its Opinion in *Aldridge III,* the Fourth Circuit repeatedly emphasized that on remand, plaintiffs were entitled to only "limited discovery." Throughout its Opinion, the Fourth Circuit used language describing the nature of the discovery which plaintiffs would be entitled to seek on remand. The word "limited" appears four separate times. *Aldridge, III,* 223 F.3d at 265, 266 and 267. In their briefs and arguments, plaintiffs have not complied with the specific instructions of the Fourth Circuit in remanding this case. They have not in their papers identified "very specifically that very small amount of information that they believe might exist . . . " *Id.* at 266. Nor have they heeded the Fourth Circuit's statement that its remand was not intended to imply that plaintiffs "are entitled to duplicative discovery." *Id.*

The broad-ranging discovery sought by plaintiffs on remand can be grouped into thirteen different categories, as follows:

(1) information relating to Goodyear's supply of synthetic rubber, natural rubber, reclaimed rubber, tire fabric and talc;

(2) information relating to other products and chemicals which Goodyear brokered, distributed and/or specified, including information about contracts, identities, quantities, warnings and handling instructions;

(3) epidemiology and mortality studies. This category of information includes a mortality study for the Cumberland plant prior to 1965 and after 1984; epidemiology studies at Goodyear and subsidiary plants; a study made of Chinese synthetic rubber workers; the 1989 study of Niagara Falls workers; a study by Dr. Davis of 7,000 rubber workers; the study made by the International Institute for Synthetic Rubber Producers of workers' occupational exposure to synthetic rubber; OSHA studies; and data that Goodyear is required to compile pursuant to the Toxic Substances Control Act;

(4) communications from labor unions regarding occupational exposure to any material or chemical used at the Cumberland plant;

(5) deposition transcripts and reports of Goodyear's experts and witnesses;

(6) insurance and health records of Goodyear, Kelly-Springfield and labor unions for employees at the Cumberland plant and at any other Goodyear plant;

(7) facts pertaining to prior claims made against Goodyear arising from workers' occupational exposure to products which Goodyear distributed to the Cumberland plant;

(8) information relating to health and safety services which Goodyear provided to Kelly-Springfield, including Goodyear's role in the creation of so-called "pass outs" and steps taken by Goodyear and Kelly-Springfield in responding to the NIOSH Infante study of the causal link between benzene and leukemia;

(9) facts pertaining to notices of violations of occupational safety laws at the Cumberland plant since 1983;

(10) communications between Goodyear and Kelly-Springfield regarding the latter's decision not to provide certain information to MOSH;

(11) specific chemical and product information, including the results of internal testing by Goodyear of various chemicals;

(12) information relating to workers' exposure to nitrosamines, carbon disulfide and other fumes in various locations in the Cumberland plant, including the Tube Room, the Stock Preparation Department, the "new" department within the Warehouse and Shipping Department, and the Final Finish Department; and

(13) authentication of the employment history and medical records of twelve named plaintiffs.

In requesting that this Court permit them to undertake the extensive discovery listed hereinabove, plaintiffs have not complied with the Fourth Circuit's Opinion in *Aldridge III*. Many of plaintiffs' pending requests seek

duplicative discovery. Many other requests were never presented to this Court before it granted Goodyear's motion. Moreover, much of the information now sought by plaintiffs has no relevance to the critical issue of causation.

Some of the information sought by plaintiffs in the above categories was previously requested by plaintiffs in counsel's Rule 56(f) affidavits, and plaintiffs' requests for that information will be addressed hereinafter. Since other information listed in the above thirteen categories was never previously requested, the Court will not permit plaintiffs to conduct further discovery relating to that information.

(b)

Plaintiffs' Prior Requests for Discovery

As noted, Goodyear's motion for summary judgment was filed on December 13, 1996.[4] Although there had already been some discovery undertaken in this case, and although plaintiffs had access to discovery in the *Heinrich* and *McClelland* litigations and had submitted three volumes of documents as "Master Exhibits," plaintiffs asked Judge Smalkin to permit them to conduct further discovery before they filed their opposition to the motion. In his Order of January 27, 1997, Judge Smalkin directed plaintiffs to furnish affidavits pursuant to Rule 56(f),

[4] As a result of the intervening proceedings which led to the Fourth Circuit's remand in *Aldridge I*, this Court did not address the merits of Goodyear's motion for summary judgment until some two years after it was filed.

indicating why sufficient facts were not already available to support plaintiffs' opposition to Goodyear's motion for summary judgment.

Six separate affidavits of their attorney were then submitted by plaintiffs in February and March of 1997. These were the only Rule 56(f) requests which were before this Court when it ruled that plaintiffs were not entitled to additional discovery because extensive discovery had previously been undertaken in the *Heinrich* and *McClelland I* litigations and because all of this discovery was available for counsel in this case. The Fourth Circuit has ruled that plaintiffs on remand are entitled to seek only those documents and that information which were responsive to their previous "requests" and which "have not previously been disclosed in one or the other of the litigations." *Aldridge III,* 223 F.3d at 266.

In disregard of the Fourth Circuit's directive, plaintiffs have made numerous new and additional requests which were not previously before this Court. These new requests will not be considered by this Court. When, as here, an adverse ruling has been rendered by a court in deciding a motion for summary judgment, the losing party is not entitled to reopen the record, obtain additional discovery not previously requested and then reargue the motion for summary judgment. Before responding to Goodyear's motion for summary judgment, plaintiffs were permitted to file affidavits under Rule 56(f). They did so, and they are not, after this Court has ruled on defendant's motion for summary judgment, entitled to expand their earlier requests. *RGI, Inc. v. Unified Industries, Inc.,* 963 F.2d 658, 662 (4th Cir. 1992). This Court, in deciding whether plaintiffs are entitled to additional limited discovery, will confine its inquiry to the requests which were

previously made by the plaintiffs and which are contained in the six affidavits of their attorney.

(c)

Plaintiffs' Rule 56(f) Affidavits

The six Rule 56(f) affidavits submitted by plaintiffs' attorney to Judge Smalkin in February and March of 1997 have been attached as exhibits to plaintiffs' motion for leave to conduct further discovery. Four of the affidavits contain only one page. Each one of these four sought information relating to the working conditions of one or more different plaintiffs. In particular, discovery was requested with reference to nitrosamines and other chemicals present in the Tube Room, the Curing Department, the Warehouse and Shipping Department, and the Tire Building. From a review of the voluminous documents filed by defendant in opposition to plaintiffs' pending motion, this Court concludes that the information sought in those four affidavits was available to plaintiffs as a result of discovery undertaken in the *Heinrich* and *McClelland* litigations.[5]

[5] In support of its opposition to plaintiffs' pending motion, defendant Goodyear has submitted nine loose leaf volumes containing thousands of pages of discovery materials previously produced in the *Heinrich* and *McClelland* litigations. Included, *inter alia*, are depositions of key Goodyear personnel, answers to interrogatories, mortality studies, purchase order sheets of Kelly-Springfield, records disclosing yearly shipments of chemicals from Goodyear to Kelly- Springfield, and yearly insurance company surveys of dust, vapors and airborne chemicals at the plant.

Particularly pertinent is the deposition testimony of Michael W. Smith taken by plaintiffs' counsel in the *Heinrich* case in December, 1985. Smith was for many years Goodyear's Environmental Coordinator for the Governmental Environmental Safety and Health Assurance Programs. His principal function was to implement company compliance with the Toxic Substance Control Act ("TOSCA"), and he was responsible for tracking Goodyear's use and distribution of chemicals. During his deposition, he testified at some length about chemicals manufactured by Goodyear and supplied to Kelly-Springfield. Reference was made to data produced by Goodyear disclosing every chemical used in the Cumberland plant since 1936, including information disclosing the exact location where each chemical was used and how each chemical was used in the manufacturing process.

Information pertaining to the testing of certain chemicals has also been provided. The information provided by Mr. Smith and by documents made available to plaintiffs was used by plaintiffs in the preparation of their voluminous exposure summaries which were included as a part of plaintiffs' 299 page opposition to defendant's motion for summary judgment. Included among the documents produced were Chemical Hazard and Toxicity ("CHAT") monitoring records. These documents identified all chemicals used at the plant since 1936, as well as the periods of their use, and provided exposure data for all areas of the plant for the ten year period from 1977 to 1987. CHAT records for each particular plaintiff were provided by Goodyear. This discovery, which was previously produced during the *Heinrich* and *McClelland* litigations, satisfied the Rule 56(f) requests made by

counsel on behalf of individual plaintiffs and contained in the four affidavits in question.

The fifth affidavit (nine pages in length) lists fourteen different plaintiffs and seeks specific information relating to their claims as well as some general information.[6] The sixth affidavit (seven pages in length) seeks a wide variety of general information and purports to address "some of the strict product liability issues that are applicable to all of the Plaintiffs."

Discovery requested in the fifth and sixth affidavits can be divided into three separate categories: (1) information previously available to plaintiffs as a result of discovery undertaken in the *Heinrich* and *McClelland* litigations; (2) information not relevant to the dispositive issue of causation and (3) information which arguably may not have been previously available to plaintiffs before they filed an opposition to defendant's motion for summary judgment.

Most of the information now sought by plaintiffs falls into the first two categories listed above. In the third category, there are five possible areas which plaintiff now argues relate to discovery not previously available to them, namely (1) the types and composition of synthetic

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[6] In that affidavit, the fourteen plaintiffs in question requested affirmation of the authenticity of methodology exhibits, quantity sheets, the NIOSH Health Hazard Evaluation Report, doctors' reports, medical records, and employment histories. In responding to those requests, Goodyear did not question the authenticity of those documents. In response to other requests in that affidavit, Goodyear has acknowledged that the Passenger Tire Building Department at the plant has been known as Department 511 and Department 51A.

rubber supplied by Goodyear; (2) the constituents of tire fabric; (3) Goodyear's knowledge of risks and hazards posed by chemicals supplied; (4) information relating to quantities of chemicals supplied; and (5) updated mortality studies and death certificates.[7]

Counsel for plaintiffs have argued at some length that information has not been provided relating to "synthetic rubber." In the *Heinrich* case, Goodyear produced a detailed description of synthetic rubbers used by Kelly-Springfield at the Cumberland plant, as well as the constituents of each synthetic rubber. The following synthetic rubbers were identified: Brominated Isobutylene-Isoprene Copolymer, Butadiene Styrene Copolymer (Crendic), Chlorobutyl Rubber, Chloroisobutylene-Isoprene Rubber, Chlorosulfonated Polyethlyne Rubber, Cold Black Masterbatch SBR, Cold Oil Black Masterbatch SBR, Cold Oil Masterbatch SBR, Copolymer of Styrene and Butadiene, Cured Butyl Rubber (Diced), EPDM, Bale, EPDM Rubber, EPDM Terpolymer, Ethylene/Propylene Copolymer, Oil Extended, Ethylene Propylene Diene Modified Rubber, Ethylene-Propylene Rubber, Ethylene-Propylene Terpolymer, High CIS Polybutadiene Homopolymer

[7] At the hearing on plaintiffs' motion, their attorney argued that information pertaining to talc and asbestos had not been supplied by Goodyear. No such information was requested in the six Rule 56(f) affidavits submitted by plaintiffs to Judge Smalkin. In any event, evidence of record establishes that Goodyear did not supply rubber processing materials containing talc or asbestos to Kelly-Springfield. *Aldridge II,* 34 F.Supp.2d at 1022, n. 19. Rubber from Goodyear did not arrive at the plant covered with talc. The talc referred to in counsel's arguments was not located on rubber delivered by Goodyear to Kelly-Springfield in box cars but was later placed by plant workers on rubber stored in the room located above the loading dock.

Rubber, Oil Extended High CIS Polybutadiene Homopolymer, Polybutadiene Oil Black Masterbatch, Polybutadiene Homopolymer, Polybutadiene Rubber Oil Extended, Polyisoprene Rubber, SBR Block Copolymer, SBR Copolymer, SBR Bale (Coolbric), SBR Black Masterbatch, SBR Latex, SBR Oil Black Masterbatch, SBR with Carbon Black, SBR Rubber (Kurtic-A), SBR Rubber Oil Extended and Silicone Rubber. It is clear from the record here that detailed information relating to synthetic rubbers, as well as information relating to natural rubbers and reclaimed rubbers, has previously been produced by Goodyear and that all of this information was available to be analyzed by plaintiffs' experts.

Plaintiffs also ask to be permitted to conduct discovery with respect to the constituents of tire fabric. However, tire fabric is a cloth which is generally made of polyester or nylon and which has no constituents that produce hazardous chemical exposures.

It is argued by plaintiffs that Goodyear has not provided discovery concerning its prior knowledge of the propensities of chemicals supplied by it and of the risks and hazards posed by these chemicals. But such information, which might be discoverable in a failure to warn case, is not relevant to the causation issue which was dispositive in this case. As this Court has previously held, negligence and fraud theories are not maintainable by plaintiffs in this case because it cannot be determined from facts of record that any identifiable chemical, whether or not supplied by Goodyear, in fact caused plaintiffs' many illnesses. *Aldridge II,* 34 F.Supp.2d at 1022. Accordingly, Goodyear had no duty to warn Kelly-Springfield about the use or presence of chemicals supplied by others nor any duty to provide handling instructions for those chemicals.

Id. Discovery relating to these matters is therefore not relevant to the dispositive issue in this case.

Plaintiffs further contend that quantity information has not been provided for the nineteen month period between 1985 and 1987 when the plant closed down. However, evidence of record establishes that the process of manufacturing tires at the Kelly-Springfield plant did not change in forty or fifty years. According to an affidavit submitted by Goodyear, quantity sheets showing inventory at the plant between 1985 and 1987 are no longer in existence and were probably thrown out when the plant was closed in 1987.[8]

According to plaintiffs, they are entitled to mortality studies and death certificates for all Kelly-Springfield workers from 1985 until 2000. But plaintiffs are entitled only to that additional discovery which might reasonably be expected to lead to evidence supporting their theories of causation. *Aldridge III,* 223 F.3d at 266. When this Court granted Goodyear's motion for summary judgment, the record before it included mortality studies and death certificates of most of the deceased plaintiffs. Although these documents disclosed the various causes of death, they had little or no relevance to the primary question before the Court, namely whether plaintiffs had produced evidence that "a particular identifiable chemical supplied by Goodyear" was a legal cause of the injuries sustained and the later deaths. *Aldridge II,* 34 F.Supp.2d at 1019. The issue before this Court was whether one or more

[8] Ten years of quantity sheets were previously produced by Goodyear.

chemicals supplied by Goodyear constituted "an independently sufficient cause of harm" and thus "a substantial contributing factor" in causing plaintiffs' injuries. *Id.* at 1020. A coroner or physician who was not present in the plant during the years in question could hardly be expected to provide relevant evidence concerning the mix of identifiable Goodyear chemicals to which a worker had been exposed. Updated mortality studies and death certificates of Kelly-Springfield workers who are not plaintiffs, like mortality studies and death certificates of plaintiffs which have already been included in the summary judgment record before the Court, would not be of assistance to plaintiffs in attempting to avoid the entry of summary judgment against them.[9] If made a part of the record, the evidence sought would not result in the creation of a disputed issue of fact.

IV

Conclusion

In sum, after an exhaustive review of the thousands of pages of discovery materials which were available for use by plaintiffs when they filed their opposition to Goodyear's motion for summary judgment, this Court concludes that the documents heretofore produced "are fully responsive to all of the individual requests by these plaintiffs." *Aldridge III,* 223 F.3d at 266. This Court is therefore satisfied that

[9] Employment history and medical records of certain plaintiffs are also sought. Information of this sort is likewise not relevant to the dispositive causation issue.

plaintiffs are not, following remand, entitled to further discovery in this case.

It is apparent from a review of plaintiffs' memoranda that they earnestly hope that something helpful may turn up in further discovery. *Goodell v. Rehrig International, Inc.*, 683 F.Supp. 1051, 1054 (E.D. Va. 1988), *aff'd*, 865 F.2d 1257 (4th Cir. 1989). But a mere hope of this sort "does not satisfy the standards of Rule 56(f)." *Id. See also Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 925, 927 (2d Cir. 1985).

Since plaintiffs may not present further evidence to the Court in opposition to defendant's motion for summary judgment, this Court will reaffirm its previous conclusion that defendant's motion for summary judgment must be granted as to all claims of all plaintiffs asserted in these consolidated cases and that judgment must be entered in favor of defendant Goodyear in each of these sixty-six cases. An appropriate Order will be entered by the Court.

/s/ Alexander Harvey
Senior United States
District Judge

DATED: December 12, 2000.

223 F.3d 263

United States Court of Appeals,
Fourth Circuit.

James R. ALDRIDGE, Sr.; Margaret Aldridge; Harry W. Atkinson; Lois V. Atkinson; Wesley B. Bartlett; Anna M. Bartlett; Leonard Beard, Sr.; Theresa Beard; Carroll E. Broadwater; Marlene Broadwater; Thomas Henry Brown; Betty Lou Brown; Eston C. Champ; Paul H. Cordial; Earlene L. Cordial; Stanley W. Corley; C. Louise Corley; Donald A. D'Atri; Shirley D'Atri; Jean C. Glass; Raymond L. Haines; Mary Catherine Haines; Ernest M. Holt; Anna Myrtle Holt; Junior A. Hott; Roxalyn Hott; Carol G. Huffman; Robert M. Iser; Wanda L. Iser; Donald Johnson; Mary Ellen Johnson; Donald Larke; Judy Larke; Irvin E. Lowery; Ada L. Lowery; William R. McCoy; Louise T. McCoy; George V. McKenzie; Dorothy E. McKenzie; William J. McKenzie; Martha McKenzie; James B. Mills; Ann Louise Mills; Robert Mitter; Mary Louise Mitter; John E. Monahan; M. Carolyn Monahan; Russell C. Morgan; Louise Morgan; Arthur L. Neder; June E. Neder; Edith G. Norris, Individually and in her Capacity as Personal Representative of the Estate of the Deceased, David P. Norris; Jack E. Ritchey; Helen J. Ritchey; Paul A. Shook; Genevieve E. Shook; Gerald D. Simmons; Barbara Simmons; William R. Spencer; Elva P. Spencer; Joseph R. Taylor; Anna K. Taylor; Richard F. Weese; Hazel M. Weese; Raymond E. Vinci; Shirley R. Vinci; Earl A. Winters; Betty M. Winters; William P. Zimmerman; Phyllis Zimmerman; Robert W. Haislip, as Personal Representative of the estate of his father Robert W. Haislip; Nellie Mae Miller; Barbara A. Fridinger, in her capacity as personal representative of the estate of the deceased, Percy R. Miller; Ronald E. Porter; Ruth M. Day; Phyllis R. Frost, in her capacity as personal representative of the estate of Frank C. Day, deceased; Mary S. Langham, individually and in her capacity as personal representative of the estate of

George E. Langham, deceased; Elmer L. Kroll; Doris R. Kroll; Priscilla Teter, individually and in her capacity as personal representative of the deceased, Brook Teter; Muriel R. Schramm, individually and in her capacity as personal representative of the estate of Calvin C. Schramm; Jessie Simmons, individually and in her capacity as personal representative of the estate of the deceased, Leonard T. Simmons; Kathleen S. Sirbaugh, in her capacity as personal representative of the estate of Arlan Eugene Sirbaugh, deceased; Jacob Loar; Sarah J. Loar; Harry F. Piper; Genevieve Piper; Leroy Robertson; Ethel H. Robertson; Albert D. Stewart; Betty Stewart; Lois Schadt; Milford G. Wilson; Dorothy M. Wilson; Evelyn V. Buser, individually and in her capacity as personal representative of the estate of Theodore U. Buser, deceased; Violet G. Gray, individually and in her capacity as personal representative of the estate of Richard R. Gray, deceased; Yoland T. Taccino; Thomas Rodger Taccino, personal representative of the estate of Edmund Joseph Taccino, deceased; Anna M. Cole, personal representative of the estate of Charles B. Cole, deceased; Mary Kathleen Jenkins, individually and in her capacity as personal representative of the estate of Richard Toll Jenkins, deceased; Jeremy Edward, surviving minor grandchild of Richard Toll Jenkins, deceased to the use of Mary Kathleen Jenkins, surviving spouse of Richard Toll Jenkins, deceased; Donald J. Folk; Arthur C. Tichnell; Carrie A. Tichnell; Waneda C. Bridges, individually and in her capacity as personal representative of the estate of Nevin H. Bridges, deceased; Gilbert L. Zimmerman; Rebecca Zimmerman; Leroy E. Gross; Carol M. Gross; Leonard D. White; Gladys Fay White; Eugene L. Zimmerman, Jr.; Phyllis M. Zimmerman; Webster Bruce Long, III; Leona Phares Long; Louis E. Schadt, Jr.; Terry Tressler; Margaret Tressler, as Personal Representatives of the estate of Robert C. Huffman; Raymond L. Champ, as personal representative of the estate of Elsie Champ, deceased; Carolyn A. Wagner, as personal representative of the

estate of Richard H. Glass, deceased; Jeane R. Kennell, as personal representative of the estate of Richard H. Glass, deceased; Lois J. Schadt, as personal representative of the estate of Louis E. Schadt, deceased; Cynthia Jane Collins, as Personal Representative of the estates of Betty H. Stewart and Albert D. Stewart; Vickie A. Hebb, as Personal Representative of the estates of Betty H. Stewart and Albert D. Stewart, Plaintiffs-Appellants,

and

David P. Norris; Percy Miller, Plaintiffs,

v.

GOODYEAR TIRE & RUBBER COMPANY, INCORPORATED, an Ohio Corporation, Defendant-Appellee.

No. **99-1275**

Argued: June 7, 2000
Decided: July 27, 2000

ARGUED: Geurdon Macy Nelson, Towson, MD, for Appellants. Joseph Carlton Wich, Jr., Venable, Baetjer & Howard, L.L.P., Towson, MD, for Appellee. ON BRIEF: James K. Archibald, Geoffrey R. Garinther, Venable, Baetjer & Howard, L.L.P., Towson, MD, for Appellee.

Before MURNAGHAN, LUTTIG, and MICHAEL, Circuit Judges.

Vacated and remanded by published opinion. Judge LUTTIG wrote the opinion, in which Judge MURNAGHAN and Judge MICHAEL joined.

OPINION

LUTTIG, Circuit Judge:

Plaintiffs sued Goodyear Tire & Rubber Co., Inc. ("Goodyear") for allegedly causing their various occupational diseases. The district court granted Goodyear's motion for summary judgment on the ground that plaintiffs could not show causation. Because we conclude that the district court should reconsider whether the plaintiffs are entitled to limited discovery, we vacate the district court's order and remand the case to that court for further proceedings.

I.

Sixty-six former employees ("Workers") of Kelly-Springfield Tire Co. ("Kelly") sued Goodyear under various theories of tort for occupational diseases contracted by them while they worked at Kelly. The Workers claim that the chemicals supplied by Goodyear to Kelly caused their diseases, and that Goodyear undertook the obligation to insure Kelly's "industrial hygiene" (workplace safety), and was therefore responsible for their diseases caused by the mishandling of all of Kelly's chemicals.

This is the fourth consolidated case of former Kelly employees suing Goodyear under similar tort theories. First, in *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F.Supp. 1348 (D.Md.1982), the parties settled after they had engaged in extensive discovery. Second, in *McClelland v. Goodyear Tire & Rubber Co.* (*McClelland I*), 735 F.Supp. 172 (D.Md.1990), the district court granted Goodyear's motion for summary judgment on the ground that plaintiffs could not prove causation by a preponderance of the evidence. Third, in *Jewell v. Goodyear Tire & Rubber Co.*,

No. S-89-3235 (D.Md.1990), the district court granted Goodyear's motion for summary judgment on the same ground as in *McClelland I.* This court affirmed *Jewell* and *McClelland. See McClelland v. Goodyear Tire & Rubber Co.,* 929 F.2d 693 (4th Cir.1991) (unpublished).

In 1997, the district court granted Goodyear's motion for summary judgment in this case on the ground that Goodyear was an employer of the Workers for purposes of Maryland workers' compensation law, and that therefore workers' compensation law provided the exclusive remedy, and Goodyear could not be sued in a tort action. *See Aldridge v. Goodyear Tire & Rubber Co.,* No. H90-140 (D.Md. Mar.5, 1997). This court vacated the district court's opinion in light of an intervening Maryland Court of Appeals opinion that indicated that Goodyear was not an employer under Maryland law. *See Aldridge v. Goodyear Tire & Rubber Co.,* 145 F.3d 1323 (4th Cir.1998) (unpublished).

On remand, the district court granted Goodyear's motion for summary judgment on the alternative ground that the Workers had failed to show causation. *See Aldridge v. Goodyear Tire & Rubber Co.,* 34 F.Supp.2d 1010 (D.Md.1999). The Workers appeal.

II.

The Workers argue that the district court erred when it did not permit them, on remand, to engage in any discovery at all before the hearing on Goodyear's motion for summary judgment.

When the district court granted Goodyear's motion for summary judgment, it explained that it would not permit

the Workers to undertake "additional discovery" in this case because (1) the *Heinrich* discovery, which included the depositions of Kelly and Goodyear personnel, was available to the Workers; (2) the *McClelland I* discovery was available to the Workers; and (3) no new or relevant evidence could be expected to be obtained which would support the Workers' theories of causation. *See Aldridge,* 34 F.Supp.2d at 1020-21.

Because these particular employees have never been permitted to conduct their own discovery, we remand to the district court to reconsider its denial of discovery to the Workers. It may well be that the district court was fully justified in denying further discovery altogether. However, on the record before this court it is unclear whether the documents heretofore produced in the combined litigations are fully responsive to all of the individual requests by these plaintiffs. Given this uncertainty, we believe it is most appropriate that the case be remanded to the district court with instructions that it provide the Workers a limited opportunity for discovery so that they may seek those documents and information, and only those documents and information, responsive to their requests that have not previously been disclosed in one or the other of the litigations.

In remanding the case, we do not intend to imply that the Workers are entitled to duplicative discovery. In fact, we anticipate that any permitted discovery will be quite limited. Without attempting in any way to limit the district court's prerogative to supervise discovery, we would expect that the Workers would be required to identify very specifically that very small amount of information that they believe might exist and that Goodyear would be required to respond only to that limited discovery

request. Following that circumscribed discovery, we believe that the district court will be in a position to better assess whether summary judgment is appropriate, and this court in a better position, likewise, to review the district court's conclusion.

VACATED AND REMANDED

34 F.Supp.2d 1010

United States District Court,
D. Maryland.

James R. ALDRIDGE, Sr., et al., Plaintiffs,
v.
The GOODYEAR TIRE & RUBBER COMPANY, Defendant.

Civil No. **H-90-140**.

Jan. 28, 1999.

G. Macy Nelson, Towson, Maryland and Sylvan H. Sack, Baltimore, MD, for plaintiffs.

James K. Archibald, Joseph C. Wich, Jr., Geoffrey R. Garinther and Venable, Baetjer and Howard, Baltimore, MD, for defendants.

ALEXANDER HARVEY, II, Senior District Judge.

In this consolidated case, this Court has once again been called upon to address the viability of claims asserted against the Goodyear Tire & Rubber Company ("Goodyear") by former employees or survivors of employees of Kelly-Springfield Tire Company ("Kelly-Springfield").[1] Like other plaintiffs in earlier suits filed against Goodyear in this Court, the plaintiffs in these sixty-six consolidated

[1] Although Kelly-Springfield is a wholly owned subsidiary of Goodyear, the two corporations are separate and distinct entities.

cases [2] have alleged that they are entitled to compensation from Goodyear under various tort theories for occupational diseases contracted by them during the course of their employment with Kelly-Springfield.

In his Memorandum Opinion filed in this case on March 5, 1997, Judge Smalkin granted summary judgment in favor of the defendant against all plaintiffs in all cases. In that Opinion, he ruled that the exclusive remedy provided by the Maryland workers' compensation law extended to Goodyear as the corporate parent of Kelly-Springfield. The plaintiffs appealed Judge Smalkin's summary judgment Order, and in *Aldridge v. Goodyear Tire & Rubber Co.,* 145 F.3d 1323 (Table), 1998 WL 230986 (4th Cir. May 11, 1998), the Fourth Circuit vacated the judgment entered and remanded the case to this Court for further proceedings in light of *Great Atlantic & Pacific Tea Co. v. Imbraguglio,* 346 Md. 573, 697 A.2d 885 (1997).

In the motion for summary judgment which Goodyear had filed in this consolidated case,[3] Goodyear also argued that it is entitled to summary judgment because plaintiffs had failed to prove causation. That argument was based on prior rulings of this Court and the Fourth Circuit in similar cases brought by employees of Kelly-Springfield. In his Memorandum Opinion of March 5, 1997, Judge Smalkin did not address the causation issue. Following the Fourth Circuit's remand of the case, counsel for Goodyear

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[2] These sixty-six cases were filed between 1990 and 1995. They were consolidated by this Court's Order of April 3, 1997.

[3] The Goodyear motion which is presently before the Court was filed on December 13, 1996.

advised the Court that it no longer wished to press its contention that Goodyear was immune from liability to the plaintiffs under the Maryland workers' compensation law. However, defendant Goodyear indicated that it now wished to press the causation arguments which had been earlier advanced in support of its motion for summary judgment but which had not been addressed by Judge Smalkin in his Memorandum Opinion of March 5, 1997. At a conference held with counsel, a schedule for further briefing of defendant's motion for summary judgment and a date for argument were set.[4]

The Court has now had an opportunity to consider the lengthy memoranda and voluminous exhibits submitted by the parties in support of and in opposition to defendant's pending motion for summary judgment. A massive record has been presented to the Court, and lengthy oral argument has been heard. For the reasons to be stated herein, the Court has concluded that the motion for summary judgment of defendant Goodyear must be granted, and that judgment in favor of defendant Goodyear must be entered in all sixty-six pending cases.

I

Background Facts

Kelly-Springfield formerly operated a tire manufacturing plant in Cumberland, Maryland. Goodyear supplied some of the chemicals used by Kelly-Springfield in its manufacturing operations. Plaintiffs or their decedents are

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[4] Following remand of this consolidated case by the Fourth Circuit, it has been reassigned to the undersigned.

former employees of Kelly-Springfield who worked at the Cumberland plant at various times between 1940 and 1987. The plant closed in 1987. Plaintiffs allege that they or their decedents developed various diseases as a result of their contact with toxic chemicals to which they were exposed during the manufacturing process at Kelly-Springfield.

The plaintiffs here are the fourth group of employees who have sought damages from Goodyear based on similar tort claims. The first group of Kelly employees filed an action against Goodyear in this Court in 1980. *Heinrich v. Goodyear Tire & Rubber Company,* 532 F.Supp. 1348 (D.Md.1982). A second group sued Goodyear in 1987, *McClelland v. Goodyear Tire and Rubber Company,* 735 F.Supp. 172 (D.Md.1990), and a third group sued in 1989. *Jewell v. Goodyear Tire & Rubber Co.,* Civil No. S-89-3235. Finally, commencing in 1990, plaintiffs comprising this fourth group filed the first of these sixty-six pending cases, alleging claims similar to those asserted in the earlier cases. Although there were settlements in the first group of these cases, summary judgment in favor of Goodyear has previously been entered in all of the cases comprising the second and third group.

II

Prior Related Proceedings

In *Heinrich v. Goodyear Tire & Rubber Company,* 532 F.Supp. 1348 (D.Md.1982), an employee of Kelly-Springfield and his spouse sought damages in connection with the occupational disease contracted by him while working at Kelly-Springfield's Cumberland plant. Ruling on Goodyear's motion to dismiss, Judge Miller of this

Court held that plaintiffs had properly stated claims against Goodyear sounding in negligence and fraud. After the parties engaged in extensive discovery, settlement was reached as to all claims in this first group of cases.

The next group of cases were consolidated and were addressed by Judge Smalkin in *McClelland v. Goodyear Tire & Rubber Co.*, 735 F.Supp. 172 (D.Md.1990) (*McClelland I*). Defendant Goodyear moved for summary judgment in those consolidated cases on the ground that plaintiffs could not prove causation by a preponderance of the evidence. The cases were referred to Magistrate Judge Chasanow of this Court who held several hearings and rendered a Report and Recommendation. The Magistrate Judge recommended that summary judgment should be entered in favor of Goodyear as to plaintiffs' strict liability and breach of warranty claims, but that summary judgment should be denied as to plaintiffs' negligence and fraud claims. *Id.* at 173. Addressing the parties' objections to the recommendations of the Magistrate Judge, Judge Smalkin concluded that Goodyear's motion for summary judgment should be granted as to all of plaintiffs' claims. *Id.* at 174.

The Magistrate Judge had concluded that insofar as the product liability based claims were concerned, the plaintiffs' evidence was insufficient to create a jury question. She determined that the plaintiffs could not show by a preponderance of the evidence that "any particular, identifiable Goodyear supplied chemical was the legal cause of their injuries." *Id.* In his Memorandum Opinion of April 25, 1990, Judge Smalkin agreed. After reviewing the record *de novo,* he said the following:

> Plaintiffs' attempts to hold Goodyear responsible, under product liability theories, for the total "toxic soup" they claim existed in their workplace, without the ability to adduce competent evidence that a reasonable fact-finder could view as showing a greater than 50% chance of a causal connection between any such product and the specific injuries they allegedly suffered, must fail. Maryland has not adopted the "market-share" theory of product liability, of which the plaintiffs here asserted a microcosmic variant. Thus, the Court concludes that the plaintiffs must suffer summary judgment on their product liability claims.

735 F.Supp. at 174.

The Magistrate Judge further concluded, however, that there was a genuine dispute of material fact as to plaintiffs' negligence and fraud claims. Judge Smalkin disagreed for the following reasons:

> The Court is of the opinion that plaintiffs have not adduced evidence that would allow a reasonable fact-finder to conclude that it was more likely than not that any particular, identifiable negligent or intentional conduct by Goodyear (and not by K-S) was the cause of any of the plaintiffs' particular illnesses. *See e.g., Agent Orange Product Liability Litigation,* 597 F.Supp. 740, 781 (E.D.N.Y.1984). Because, even taking the inferences to be drawn from the plaintiffs' experts testimony in the light most favorable to plaintiffs, as the Court must do on summary judgment, it would be impossible for them to show by a preponderance that any particularly, identifiable conduct by Goodyear was in any

> sense the proximate cause of their particular illnesses, *see Owens by Owens v. Bourns, Inc.*, 766 F.2d 145, 150 (4th Cir.1985), defendant is entitled to summary judgment on the negligence and fraud claims. To hold otherwise would be, again, to adopt a microcosmic variant of the "market share" approach, albeit under more traditional tort theories than product liability theories. It would impose liability on too slender a reed to be tolerated under Maryland law, one not rising above the level of *post hoc, ergo propter hoc.* Blame, in the legal sense, cannot be so easily assigned, even where unfortunate consequences ensue.

Id. at 174-75.

Judge Smalkin then went on to consider in his Opinion a question which had been supplementally briefed by the parties, *viz.*, whether the exclusive remedy provided by Maryland's workers' compensation law extended to Goodyear as the corporate parent of Kelly-Springfield. *Id.* at 175. Judge Smalkin conceded that, since an independent ground existed in the case for the entry of summary judgment in favor of Goodyear, it was "unnecessary to the Court's decision" to answer this question. *Id.* Nevertheless, he stated that "the Court would, if the question were presented to it (*i.e.*, assuming that proximate causation could be proved on the negligence and fraud theories), answer in the affirmative." *Id.* This dictum was based on the Court's analysis of decisions in Maryland and other states recognizing that a parent company can be an employer of persons working for a subsidiary and can be entitled to the exclusivity protection of the workers' compensation laws. *Id.*

Twelve consolidated cases were involved in *McClelland I.* Thereafter, defendant Goodyear moved for summary judgment in five similar cases. In his Memorandum of May 9, 1990 entered in *Jewell v. Goodyear Tire & Rubber Co.,* Civil No. S-89-3235, Judge Smalkin granted summary judgment in favor of defendant Goodyear in those five cases as well, relying on the reasons set forth in his *McClelland I* ruling.

Plaintiffs in both *McClelland I* and *Jewell* appealed to the Fourth Circuit. In its unpublished *per curiam* opinion of March 25, 1991, the Fourth Circuit affirmed the entry of summary judgment in favor of defendant Goodyear in all of the *McClelland* and *Jewell* cases. *McClelland v. Goodyear Tire & Rubber Co.,* Nos. 90-3087, 90-3090, 90-3091, 90-3092, 90-3093 and 90-3094, 929 F.2d 693 (Table), 1991 WL 38700 (4th Cir. March 25, 1991) (*McClelland II*). Addressing plaintiffs' strict liability and breach of warranty claims, the Fourth Circuit said the following:

> In the end, even giving full consideration to the plaintiffs' deposition testimony of experts, causation (evidence of particular practices causing the plaintiffs' injuries) has not been established sufficiently to withstand summary judgment, carrying the day for Goodyear. The plaintiffs failed to produce adequate evidence that the injuries to them resulted from Goodyear's activities rather than other causes. The torts asserted coalesce into furnishing various toxic-making chemicals to Kelly-Springfield without adequate concern for the health of Kelly-Springfield workers.
>
> The absence of a preponderance of the evidence (or, indeed, of any evidence) that any particular, identifiable chemical supplied by Goodyear was the legal cause of the plaintiffs' injuries was the

> basis on which strict liability and breach of warranty claims were struck. The magistrate judge so recommended, the district court, after *de novo* review of the record, agreed, and we affirm.

1991 WL 38700 at *2-3.

Addressing plaintiffs' negligence and fraud claims, the Fourth Circuit went on to say:

> Turning to the claims of negligence and fraud, the district judge concluded, and, upon investigation of the record, we concur that a more likely than not finding that any particular, identifiable negligent or fraudulent conduct by Goodyear was the cause of the illnesses complained of could not be made. It was not the negligence or fraud which was in question, but the causation proceeding therefrom. *Peterson v. Underwood,* 258 Md. 9, 16-17, 264 A.2d 851, 854 (1970) ("We think plaintiff's proof was clearly sufficient to allow the jury to find that Norman negligently constructed and Christine failed to inspect the wall, and that Johnny's death was the result of the collapse of that wall. What we find to be a fatal defect in appellant Underwood's case is lack of any evidence causally linking defendants' negligence to the injury suffered.") Carcinogenic promoter and pulmonary irritant exposure characteristics of the toxic soup did not equate to causation of things done or undone or individual substances supplied by Goodyear.

1991 WL 38700 at *3.

Based on its determinations as to lack of proof of causation, the Fourth Circuit found it unnecessary to decide the case (and specifically abstained from so doing) on the alternative ground suggested by Judge Smalkin,

namely that the workers' compensation exclusive remedy barred the action against Goodyear as Kelly-Springfield's wholly owning parent. *Id.* The Fourth Circuit determined that it was not necessary for Goodyear to establish whether there was statutory employer status or not since it "would win in either event." *Id.*

When Goodyear's motion for summary judgment later came before him in 1997 in this pending consolidated case,[5] Judge Smalkin chose to apply the alternative theory discussed by him in *McClelland I.* He accordingly held that the exclusivity bar of Maryland's worker's compensation law compelled the granting of summary judgment in favor of defendant Goodyear in all these consolidated cases. Memorandum Opinion of March 5, 1997, slip op. at 5-6. Summary judgment in all cases was accordingly entered in favor of defendant Goodyear.

Plaintiffs appealed to the Fourth Circuit. Shortly after the appeal was filed, the Court of Appeals of Maryland determined that Judge Smalkin's *dicta* in *McClelland I* was "suspect." *See Imbraguglio,* 346 Md. at 594, 697 A.2d 885. Counsel for Goodyear thereupon conceded in its brief on appeal that the order awarding it summary judgment

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[5] Resolution of these consolidated cases was delayed when, at an early stage of this litigation, counsel for the plaintiffs suggested that these were essentially asbestos cases. They were accordingly transferred to the Eastern District of Pennsylvania for handling by Judge Weiner as part of his MDL 875 docket. Later, however, counsel for plaintiffs indicated that these were not traditional or strictly asbestos cases but were rather "regular product liability – negligence occupational disease litigation, involving multiple diseases and multiple chemicals/substances." Based on that representation, the cases were then remanded by Judge Weiner to this Court for further proceedings.

should be reconsidered by this Court in light of *Imbraguglio. Aldridge,* 1998 WL 230986 at *2. Accordingly, the judgments were vacated and the case was remanded to this Court. *Id.* at *2-3.

III

Summary Judgment Principles

It is well established that a party moving for summary judgment bears the burden of showing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Barwick v. Celotex Corp.,* 736 F.2d 946, 958 (4th Cir.1984). Where, as here, the nonmoving party will bear the ultimate burden of persuasion at trial, "the burden on the moving party [at the summary judgment stage] may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

One of the purposes of Rule 56 of the Federal Rules of Civil Procedure is to require a plaintiff, in advance of trial and after a motion for summary judgment has been filed and properly supported, to come forward with some minimal facts to show that a defendant may be liable under the claims alleged. *See* Rule 56(e). If the nonmoving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then "the plain language of Rule 56(c) mandates the entry of summary judgment." *Catrett,* 477 U.S. at 323, 106 S.Ct. 2548.

While the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to

the party opposing the motion, *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985), "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "'A mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely.'" *Barwick*, 736 F.2d at 958-59 (quoting *Seago v. North Carolina Theatres, Inc.*, 42 F.R.D. 627, 640 (E.D.N.C.1966), *aff'd*, 388 F.2d 987 (4th Cir.1967), *cert. denied*, 390 U.S. 959, 88 S.Ct. 1039, 19 L.Ed.2d 1153 (1968)). Moreover, only disputed issues of *material* fact, determined by reference to the applicable substantive law, will preclude the entry of summary judgment. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In the absence of the necessary minimal showing by a plaintiff that the defendant may be liable under the claims alleged, the defendant should not be required to undergo the considerable expense of preparing for and participating in a trial. *See Catrett*, 477 U.S. at 323-24, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 256-57, 106 S.Ct. 2505. Indeed, the Fourth Circuit has stated that, with regard to motions for summary judgment, the district courts have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses from proceeding to trial'." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987) (quoting *Catrett*, 477 U.S. at 323-24, 106 S.Ct. 2548).

Applying these principles to the facts of record here, this Court has concluded that the motion for summary judgment of defendant Goodyear must be granted and that judgment in favor of defendant Goodyear must be entered in each of these consolidated cases.

IV

The Claims and Defenses

The complaints and amended complaints in these consolidated cases seek recoveries from defendant Goodyear based on the following theories: (1) strict liability; (2) breach of warranty; (3) negligence; and (4) fraudulent concealment. Plaintiffs contend that Goodyear manufactured and sold to Kelly-Springfield specific toxic chemicals, that each worker plaintiff was exposed to these toxic substances and that such exposure caused or contributed to a certain disease contracted by the worker.[6] Plaintiffs further assert that Goodyear undertook an obligation to ensure general plant safety at Kelly-Springfield and claim that Goodyear is also responsible in tort for the harm caused by toxic substances which Goodyear did not supply.

The principal contention advanced by Goodyear in support of its motion for summary judgment is that, as in prior similar cases brought by other Kelly-Springfield

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[6] In the *McClelland* and *Jewell* cases and in this case, the plaintiffs have alleged that they contracted the same types of diseases. More than fifty different illnesses are claimed to have been caused by Goodyear's wrongful conduct. Cancer, cardiovascular disease and lung disease are the predominate illnesses alleged.

workers, the plaintiffs here have failed to produce evidence upon which a reasonable juror could rely to conclude that Goodyear-supplied chemicals or those supplied by another entity in fact caused their various ailments. Relying on the rulings made by Judge Smalkin in *McClelland I* and by the Fourth Circuit in *McClelland II,* defendant argues that the principles of law applied by this Court and by the Fourth Circuit[7] to similar facts bar any recovery by plaintiffs in the pending cases.

Faced with the clear applicability of this Court's and the Fourth Circuit's rulings in the *McClelland* cases, plaintiffs have presented to the Court a massive record.[8] Mindful of the determinations in *McClelland I* and *McClelland II* that the plaintiffs in that litigation had failed to provide any evidence linking a particular, identifiable chemical to their diseases, the plaintiffs have here submitted voluminous affidavits, exhibits and other evidentiary materials which were not a part of the record in *McClelland* or *Jewell.* They present this additional evidence largely in the form of supplemental affidavits which attempt to link the plaintiffs' diseases to specific chemicals supplied by Goodyear to Kelly-Springfield. Plaintiffs argue at length that sufficient evidence has now been produced by them to create a dispute of material fact in each case as to the causation issue. However, in spite of

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[7] Since the Fourth Circuit's unpublished disposition in *McClelland II* of the same issues that arise here has significant precedential value and since no published opinion would serve as well, Goodyear has properly cited and relied on the *McClelland II* opinion. *See* Fourth Circuit Local Rule 36(c).

[8] Plaintiffs' opposition brief is 299 pages in length. In addition, separate oppositions have been filed in many of the pending 66 cases.

the prodigious volume of plaintiffs' submissions, they still have not on this record been able to satisfy their burden of proving causation under any of the four tort theories advanced. Plaintiffs' claims are ripe for adverse summary judgment determinations because they are "based upon [theories] without proof." *Hinkle v. City of Clarksburg,* 81 F.3d 416, 423 (4th Cir.1996). Since no disputed issue of material fact as to the question of causation is presented by the record here, summary judgment in favor of defendant Goodyear will be entered in all of these pending cases.

V

Goodyear-Supplied Chemicals

Proof of proximate causation has always been a significant hurdle faced by a plaintiff seeking a recovery in tort for an occupational disease. Plaintiffs' decision to seek tort recoveries from Goodyear, which was not their employer, must face "the availability to Goodyear . . . of defenses, primarily absence of causality. . . ." *McClelland II,* 1991 WL 38700 at *1. Because of problems faced by a claimant in overcoming a defense based on lack of causation, workers' compensation laws, which do not require proof of causation, have in Maryland and other states been extended to cover occupational diseases. Md.Ann.Code Art. 101, § 15 (1990). Indeed, the plaintiffs in this case have filed workers' compensation claims against Kelly-Springfield, and these claims have been stayed pending the outcome of this litigation. But, in here seeking under various tort theories much larger recoveries for their occupational diseases from an entity which was not their employer, plaintiffs face what the Court in *McClelland II* characterized as one of the "landmines" presented by

Goodyear's causation defense "which would have to be overcome to make out a viable claim in tort." 1991 WL 38700 at *2.

As disclosed by the record here, workers at the Kelly-Springfield plant were exposed to a great many chemicals. However, Goodyear supplied only ten percent of the plaintiffs' list of approximately two hundred potentially hazardous chemicals to which they were exposed. Affidavits of plaintiffs' own experts reveal the extreme difficulties faced by plaintiffs in their effort to defeat summary judgment in this case.

For example, according to Dr. Michael M. Lipsky, Jr., plaintiffs' principal expert witness,[9] as many as twenty-eight different chemicals at the Kelly-Springfield plant have the capacity to be a substantial contributing cause of cancer if sufficient exposure to each of the chemicals has occurred.[10] However, only three of these are Goodyear-supplied chemicals, namely N-Nitrosodimethylamine ("NDMA"), Nitrosomorpholine ("NMOR") and 4-aminobiphenyl ("4AB"). But even these three cannot be attributed exclusively to Goodyear. According to Dr. Donohue, another one of plaintiffs' experts, many of the Goodyear-supplied chemicals are not toxic until they decompose in

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[9] Affidavits of Dr. Lipsky were a part of the record in the *McClelland* and *Jewell* litigations. Both Judge Smalkin and the Fourth Circuit determined that these and other affidavits submitted by plaintiffs did not constitute sufficient evidence to defeat the motion for summary judgment filed by Goodyear in those cases.

[10] Dr. Marc D. Donohue has similarly stated that numerous chemicals at the plant have the capacity to be a substantial contributing cause of heart disease.

the various hot processes of the tire plant. The toxic elements of the chemicals are often the byproduct of the interaction between many different chemicals, the vast majority of which were not supplied by Goodyear.

In his deposition in the *Heinrich* case, Dr. Lipsky was asked to explain his testimony that at any level of exposure the chemicals listed in his affidavits substantially increased the risk of causing cancer. When asked what he meant by the phrase "substantially," he stated that he could not give a quantitative assessment for the term, namely a number or percent. He explained that he was merely saying that the risk was greater with the exposure than it would have been without the exposure. This testimony hardly constitutes competent evidence which "a reasonable fact-finder could view as showing a greater than 50% chance of a causal connection" between a Goodyear product and the specific illnesses alleged by plaintiffs. *McClelland I,* 735 F.Supp. at 174.

Defendant notes that the deposition testimony of Dr. Lipsky in *Heinrich* is inconsistent with statements contained in his affidavits filed in this case. In contrast to the opinions proffered here, Dr. Lipsky testified in the *Heinrich* case that he could not say that any of the particular chemicals listed in his affidavits contributed to the cancer of any specific plaintiff. He also stated that he was not qualified to testify as to the concentration of any individual chemical necessary to cause harm and that he was not expressing any opinion as to whether the exposure of any plaintiff to any particular chemical was sufficient to be a substantial contributing factor to the individual's disease. It appears that Dr. Lipsky has now re-fashioned his opinions to meet the deficiencies in plaintiffs' proof described in *McClelland I* and *McClelland II.* This Court

would note that the Fourth Circuit has held that a district court is justified in disregarding the affidavit of an expert when it conflicts with that expert's earlier deposition testimony. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 976 (4th Cir.1990).

In any event, it is apparent from the Court's review of all of the affidavits submitted by plaintiffs that their experts have not been able to isolate the toxic effects of the Goodyear-supplied chemicals from the effects of the host of other chemicals not supplied by Goodyear. Many chemicals at the Kelly-Springfield plant which are toxic in and of themselves were not supplied by Goodyear. In one of his affidavits, Dr. Lipsky confirmed that many chemicals, most of which were not supplied by Goodyear, are potential contributing causes of one or more of the diseases claimed by plaintiffs. Dr. Donohue's affidavits acknowledge that, while the carcinogens NDMA, NMOR and 4AB can in theory be derived exclusively from Goodyear-supplied chemicals, the NDMA, NMOR and 4AB present at the Kelly-Springfield plant were necessarily derived from a few chemicals supplied by Goodyear, from many chemicals not supplied by Goodyear, and from the countless interactions between all these chemicals which occurred during the hot processing of rubber at the plant. Plaintiffs' own evidence thus indicates that Goodyear at most supplied only a small fraction of the total chemicals at Kelly-Springfield which may have caused or contributed to their various illnesses.

As indicated by the *McClelland* litigation, plaintiffs in this case must produce evidence that a "particular, identifiable chemical supplied by Goodyear" was a legal cause of

their injuries.[11] *McClelland I,* 735 F.Supp. at 174; *McClelland II,* 1991 WL 38700 at *3. This they have failed to do. It is not possible to determine from facts of record whether any Goodyear-supplied chemical in fact caused plaintiffs' illnesses. That the presence of a particular chemical may have increased the risk of harm hardly constitutes causation in fact. In view of the presence at the Kelly-Springfield plant of a host of different chemicals interacting with each other, some supplied by Goodyear and some not, and in view of the complicating effects of other potential contributing factors to plaintiffs' cancer and heart disease such as genetics, overall health considerations, diet and smoking habits, a reasonable fact-finder would not be able to conclude that any one of the identifiable chemicals supplied by Goodyear caused plaintiffs' illnesses. Cancer and cardiovascular disease are common illnesses suffered by a significant proportion of the general population. As the Fourth Circuit stated in *McClelland II,* the plaintiffs have "failed to produce adequate evidence that the injuries to them resulted from Goodyear's activities *rather than other causes.*" 1991 WL 38700 at *2. (Emphasis added).

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[11] Plaintiffs erroneously argue that defendant Goodyear has the burden under Rule 56(c) of providing evidence to show the absence of a genuine issue of material fact. But Rule 56 does not require that Goodyear support its motion with affidavits or other similar materials negating plaintiffs' claims. *Catrett,* 477 U.S. at 323, 106 S.Ct. 2548. Once a motion for summary judgment has been properly filed by a defendant, the plaintiffs have the burden of establishing every essential element of their case, and, if they fail as to any one element, the plain language of Rule 56(c) "mandates the entry of summary judgment." *Id.*

Plaintiffs argue that this is a different case from *McClelland I.* Certainly, since different plaintiffs are involved here, the *McClelland* rulings have no *res judicata* or collateral estoppel effect in this case. However, this case and the *McClelland* and *Jewell* litigations have sufficient commonality that the principles enunciated there by Judge Smalkin and by the Fourth Circuit in its affirmance of Judge Smalkin's rulings are controlling here. The material facts here and in *McClelland* are virtually identical. The same claims have been asserted, and recoveries are being sought here for the same types of diseases. The tire workers in this case worked in the same locations, in the same plant and during the same time periods as did those in both *McClelland* and *Jewell.* Moreover, the same toxic chemicals are at issue here, and plaintiffs have alleged that they were exposed to those chemicals in the same manner as were the plaintiffs in the *McClelland* and *Jewell* litigations.

In their attempt to avoid the decisive application of the *McClelland* rulings, plaintiffs argue that there has been a change or clarification of Maryland law since the Fourth Circuit decided *McClelland II.* Relying on *Eagle-Picher Industries, Inc. v. Balbos,* 326 Md. 179, 604 A.2d 445 (1992), and *Shetterly v. Raymark Industries, Inc.,* 117 F.3d 776 (4th Cir.1997), plaintiffs argue that Maryland has now replaced in a case of this sort the "but-for" causation standard with a "substantial factor" test.[12] However, there

[12] Plaintiffs also cite *Owens-Corning Fiberglas Corporation v. Garrett,* 343 Md. 500, 682 A.2d 1143 (1996) and *ACandS, Inc. v. Asner,* 344 Md. 155, 686 A.2d 250 (1996), which are similar asbestos cases.

has been no recent change in the Maryland law of causation. In *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir.1986), the Fourth Circuit recognized that in a case involving the alleged liability of a number of different defendants, the plaintiff was required under Maryland law to prove that the conduct of each particular defendant was "a substantial factor" in bringing about the result. *Id.* at 1162 (citing *Robin Express Transfer, Inc. v. Canton R.R.*, 26 Md.App. 321, 335, 338 A.2d 335 (1975)).[13]

As plaintiffs have correctly stated, the substantial factor test for causation rather than a "but-for" test should under Maryland law be applied in a case involving multiple causes of a particular harm. However, plaintiffs miscomprehend the underlying requirements for the application of the substantial factor test in a case like this one. The critical question here is whether Goodyear's chemicals or conduct were independently *sufficient* causes of harm to the plaintiffs. A cause must be sufficient before it can be substantial. *See Restatement (Second) of Torts*, § 432(2) ("if . . . each [force] of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial contributing factor"). The *Balbos* case itself recognizes that this sufficiency requirement must first be met in a case involving multiple causes of a particular harm. As the Court of Appeals of Maryland there observed, " '[i]f two causes concur to bring about an event, *and either one of them, operating alone, would have been sufficient to cause the identical result,*' some test of

[13] As did the Court of Appeals of Maryland in *Balbos*, the Fourth Circuit in *Lohrmann* found applicable the standard set forth in *Restatement (Second) of Torts* § 431. *See* 782 F.2d at 1162.

proximate causation, other than 'but-for' is needed." 326 Md. at 208, 604 A.2d 445 (quoting W. Keeton, *Prosser & Keeton on the Law of Torts* § 41 at 266 (5th ed.1984) (emphasis added).)

Balbos and the other cases relied upon by plaintiffs were asbestos cases. Asbestos is known to cause asbestosis and mesothelioma, and that this product is a sufficient cause of harm is rarely a contested issue in asbestos litigation. Thus, since asbestos in itself is sufficient to cause harm, the substantial factor test has been properly applied in *Balbos* and other Maryland asbestos cases to determine whether there has been adequate proof of causation. Here, each chemical supplied by Goodyear must be an independently sufficient cause of harm before it can be a substantial contributing factor.[14] As discussed

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[14] Professor David W. Robertson has cogently noted in *The Common Sense of Cause-in-Fact,* 75 Tex.L.Rev. 1765, 1778-80 (1997) that courts often err in applying the substantial factor test in a case involving multiple causes of a particular harm. As he observed:

> The only "combined active conduct" cases in which the substantial factor test is needed are those in which the defendant's conduct was by itself sufficient to accomplish the harm but did not seem to be a but-for cause of the harm because it was fortuitously joined by the causal conduct of another that was also by itself insufficient to accomplish the harm.
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> * * *
>
> The real trouble begins when courts go a step further and start treating the relatively vague substantial factor vocabulary as an improvement upon the but-for test with respect to any multiple causation case in which analysis appears difficult. As we have seen, the only multiple causation cases that are legitimately solved by the substantial factor test are the "combined force" situations in which we

(Continued on following page)

hereinabove, the proof relied upon by plaintiffs does not show by a preponderance of the evidence that any particular, identifiable Goodyear-supplied chemical was of itself sufficient to cause harm to the plaintiffs.

At the conference held with counsel following remand of this case by the Fourth Circuit, the Court denied plaintiffs' request that they be permitted to undertake additional discovery. Plaintiffs argue that, pursuant to Rule 56(e), they should have been permitted to conduct further discovery before responding to the pending motion for summary judgment. The Court must disagree.

The original *Heinrich* cases were extensively litigated between 1980 and 1986. A large amount of discovery was undertaken in those cases, all of which is now and has been available to plaintiffs and their attorneys.[15] In the *Heinrich* litigation, voluminous documents were produced both by Goodyear and by Kelly-Springfield, and the depositions of 28 management and other personnel of Goodyear were taken by counsel for plaintiffs. The Court would note in particular that the plaintiffs in *Heinrich* took the deposition of Michael W. Smith, who was Goodyear's Environmental Coordinator of Governmental Environment, Safety and Health Insurance Programs.

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are morally certain that the but-for test stubbornly persists in yielding the wrong answer. When courts begin turning to the substantial factor vocabulary in a broader range of cases, valuable precision of analysis is lost and nothing is gained.

[15] Sylvan H. Sack, Esq., one of plaintiffs' attorneys in this case, was also co-counsel for plaintiffs both in the *Heinrich* and in the *Jewell* cases.

Smith's deposition testimony and the affidavit he later filed in *McClelland* contain detailed information concerning chemicals supplied by Goodyear to Kelly-Springfield and those supplied by other companies. Eleven representatives of Kelly-Springfield were also deposed. The Kelly-Springfield plant closed in 1987, and there is little new information of any consequence which could be revealed by way of additional discovery.

Discovery undertaken in the *McClelland* litigation is also available to plaintiffs.[16] In his letter of January 14, 1988 to Judge Smalkin, counsel for the plaintiffs in the *McClelland* litigation noted that discovery had been virtually completed "four years ago" and objected to the convening of a conference "for the purpose of scheduling dilatory, expensive and wholly unnecessary, redundant protracted discovery on limited issues." At the hearing held in the *McClelland* litigation before Magistrate Judge Chasanow on January 12, 1990, counsel for plaintiffs relied on evidence provided by "experts who have testified . . . at deposition and have also expressed opinions incorporated in answers to interrogatories that those chemicals . . . are sufficient to be substantial contributing causes of the disease." (Tr. of hearing, p. 68-69.) In her Report and Recommendation of January 31, 1990, Magistrate Judge Chasanow stated: "For some time now, the parties have been focusing on the issue of causation, first with regard to

[16] In the opposition to Goodyear's motion for summary judgment which they earlier filed in this case on February 3, 1997, plaintiffs conceded that "the *McClelland* plaintiffs and Goodyear conducted extensive discovery on the sufficiency of the opinions of plaintiffs' experts pertaining to causation of diseases." (Plaintiffs' Opposition at 4).

discovery and now on summary judgment." As the Fourth Circuit noted in *McClelland II,* discovery limited to the issue of causation had been requested in that case, and Goodyear had moved for summary judgment "following discovery." 1991 WL 38700 at *1.

Moreover, the critical causation issue is not one as to which new relevant information could be expected to be obtained from defendant Goodyear. In opposing defendant's motion for summary judgment, plaintiffs have relied principally on information within their exclusive possession and control, namely the affidavits of their experts and the exhibits filed in support of the experts' opinions. Additional discovery could not reasonably be expected to add relevant and material evidence to the facts of record here. In view of the extensive discovery previously undertaken in *Heinrich* and *McClelland,* all of which has been available to plaintiffs, this Court is satisfied that it properly denied plaintiffs' request that they be permitted to engage in further discovery following remand of this case by the Fourth Circuit.

For all these reasons, this Court concludes that defendant Goodyear is entitled to the entry of summary judgment as to all of plaintiffs' claims based on their exposure to chemicals supplied by Goodyear to Kelly-Springfield. [17]

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[17] Plaintiffs have asserted strict liability claims under both § 402A and § 402B, *Restatement (Second) of Torts.* Both of these claims must fail because of the lack of proof that an identifiable chemical supplied by Goodyear was the legal cause of the plaintiffs' illnesses.

VI

Chemicals Supplied by Others

In their complaints and amended complaints, plaintiffs also seek recoveries from Goodyear under negligence and fraud theories for occupational diseases which were allegedly caused by chemicals which Goodyear did not supply. Relying principally on § 324A of the *Restatement (Second) of Torts*,[18] plaintiffs contend that Goodyear undertook to advise Kelly-Springfield concerning health and safety procedures and to provide Kelly-Springfield with handling precautions for chemicals which were not supplied by Goodyear. According to plaintiffs, Goodyear is liable to Kelly-Springfield workers for failing to exercise reasonable care in performing the duties it had assumed and also because the workers suffered harm when they relied to their detriment on Goodyear's actions.

Plaintiffs are faced with the same insurmountable hurdles when seeking recoveries for harm caused by chemicals not supplied by Goodyear as they faced when seeking recoveries for Goodyear-supplied chemicals. Once

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[18] Section 324A provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or
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> (b) he had undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

again, they have failed to produce evidence that a particular, identifiable chemical was a legal cause of their illnesses. For the reasons stated hereinabove, it cannot be determined from facts of record whether any identifiable chemical, whether or not supplied by Goodyear, in fact caused plaintiffs' many illnesses. Since there is insufficient proof that plaintiffs' illnesses were caused by the dangerous properties of *any* of the chemicals to which the workers were exposed, Goodyear had no duty to warn Kelly-Springfield about the use or presence of chemicals supplied by others, including asbestos products.[19] As the Fourth Circuit concluded in *McClelland II,* since a more likely than not finding could not be made "that any particular, identifiable negligent or fraudulent conduct by Goodyear was the cause of the illnesses complained of . . . [i]t was not the negligence or fraud which was in question, but the causation proceeding therefrom." 1991 WL 38700 at *3. This conclusion applies with equal force to the facts of record in this case.

Plaintiffs would not in any event be entitled to recover damages from Goodyear under § 324A. Goodyear was not the guarantor of plant safety for Kelly-Springfield workers. In the contract which Goodyear entered into with Kelly-Springfield in 1953, Goodyear undertook to provide assistance and advice to Kelly-Springfield merely "with regard to research, development design and improvement in all fields pertaining to the rubber industry." Paragraph

[19] Goodyear did not manufacture asbestos nor supply rubber processing materials containing asbestos to Kelly-Springfield, and Goodyear played no part in the installation or maintenance of pipecovering asbestos materials in the Kelly-Springfield plant.

6 of that contract specifically stated that the agreement "shall not be deemed to include any [Goodyear] services at the plants of [Kelly-Springfield]," although noting that Goodyear might render some additional services upon agreement of the parties. The record indicates that Goodyear from time to time gave advice to Kelly-Springfield on industrial hygiene matters. However, Goodyear was not, as claimed by plaintiffs, "hired" to act as the industrial hygiene expert for Kelly-Springfield's entire plant. There is no evidence of record indicating that Goodyear undertook, as an assumed duty to Kelly-Springfield, to provide the latter's workers with handling precautions or to warn them of risks encountered when they exposed themselves to various chemicals. If such a duty existed, it would be Kelly-Springfield's and Kelly-Springfield's alone. Worker safety at its plant was the responsibility of Kelly-Springfield, not that of Goodyear. To prevail under § 324A, plaintiffs must prove both the existence of a Goodyear undertaking to Kelly-Springfield and Goodyear's failure to exercise reasonable care in the performance of such an undertaking. No such proof exists in this record.

For all these reasons, defendant Goodyear is also entitled to summary judgment as to plaintiffs' claims based on their exposure to chemicals which were not supplied by Goodyear.

VII

Admissibility of Expert Opinions

As an alternative argument in support of its motion for summary judgment, Goodyear contends that the conclusory affidavits submitted by plaintiffs are not admissible because the opinions rendered by plaintiffs'

experts do not satisfy the requirements of Rule 702, F.R.E. and *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). According to Goodyear, the expert opinions relied upon by plaintiffs are too vague and conclusory to be received as admissible evidence in this case.

Only Dr. Lipsky and Dr. Caplan have opined that chemicals supplied by Goodyear were a substantial contributing factor to the illnesses contracted by the plaintiffs.[20] Their affidavits contain essentially the same boilerplate language:

> It is my opinion with a reasonable degree of medical probability that each of the chemicals identified above was a substantial contributing cause of Mr. _____'s *(disease)*. I base this opinion on my training and experience, my own scientific research, and my knowledge of the scientific literature, as well as Mr. _____'s occupational history as provided to me by counsel for Mr. _____.

Daubert requires that when considering the admissibility of an expert opinion under Rule 702, a federal judge must exercise a "gatekeeping responsibility" to insure that admitted scientific testimony is both relevant and reliable. 509 U.S. at 589, n. 7, 600; 113 S.Ct. 2786, 125 L.Ed.2d 469. Before the Court can consider expert opinions of the sort relied upon here by plaintiffs, threshold standards for the admissibility of such evidence must be met. As Judge

---

[20] Affidavits of the following five experts have been submitted by plaintiffs: Dr. Michael M. Lipsky, Jr., Dr. Marc D. Donohue, Dr. Raymond F. Caplan, Dr. Thomas Hobbins and Dr. Neil B. Jurinski.

Young noted in *Marder v. G.D. Searle & Co.*, 630 F.Supp. 1087, 1089 (D.Md.1986), *aff'd*, 814 F.2d 655 (4th Cir.1987) (Table), the Fourth Circuit has cautioned that special care should be taken when assessing the sufficiency of causation evidence in a case where such evidence is wholly circumstantial. In performing its "gatekeeping" task, a district judge must engage in a two-part analysis. *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir.), *cert. denied*, 515 U.S. 1168, 115 S.Ct. 2631, 132 L.Ed.2d 871 (1995). The Court must first make essentially a reliability inquiry and determine whether the proffered expert testimony consists of "scientific knowledge." *Id.* Particularly in establishing causation in product liability and toxic tort actions, expert opinion testimony must be grounded on reliable data. *Maddy v. Vulcan Materials*, 737 F.Supp. 1528, 1533 (D.Kan.1990). Second, the Court must inquire further to ascertain whether the proposed testimony is relevant, that is, whether under Rule 702 it will "assist the trier of fact." *Dorsey*, 45 F.3d at 813. In determining whether challenged expert evidence properly satisfies the reliability component of the test, the Supreme Court in *Daubert* held that a trial court may consider several factors: (1) whether the theory or technique used by the expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; and (4) the degree of the method's or conclusion's acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786; *Dorsey*, 45 F.3d at 813.

Applying in this case the principles of *Daubert* and subsequent decisions interpreting it, this Court concludes that the affidavits of Dr. Lipsky and Dr. Caplan submitted by plaintiffs must be excluded. Vague and conclusory

terms like "substantial contributing cause" and "knowledge of the scientific literature" standing alone do little to satisfy the reliability requirement. As the Supreme Court recently stated, "[n]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997).

To be properly admissible under Rule 702, expert testimony "requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient." *Moore v. Ashland Chem. Co.*, 151 F.3d 269, 276 (5th Cir.1998); *see also Cavallo v. Star Enterprise*, 892 F.Supp. 756, 760-61 (E.D.Va.1995), *aff'd in part*, 100 F.3d 1150, 1159 (4th Cir.1996). In a comment directly relevant to the circumstances of this case, the Court in *Cavallo* referred to evidence indicating that "all chemicals can cause health problems at some level" and noted that it is therefore critical that an expert testifying as to the effects of exposure to chemicals identify the threshold level required to cause a particular effect. 892 F.Supp. at 764. In a toxic tort case, "the extrapolation or leap from one chemical to another must be reasonable and scientifically valid." *Moore*, 151 F.3d at 279 (citing *Daubert*, 43 F.3d at 1319-20 and *Cavallo*, 892 F.Supp. at 769).

In their affidavits, neither Dr. Lipsky nor Dr. Caplan state (1) what training or experience they have relied upon in reaching conclusions that particular chemicals cause specific illnesses, (2) what scientific research they have conducted and what experience they have that renders them qualified to give their opinions, (3) what "scientific

literature" supports their conclusions, and (4) what threshold level of exposure to a particular chemical is necessary to cause a particular disease. Most significantly, all of plaintiffs' experts have failed to adequately address possible alternative causes of plaintiffs' illnesses. Many of these illnesses, including cancer and cardiovascular disease, are commonly known to be influenced by a complex, and as yet poorly understood, interplay of genetic and environmental factors. Plaintiffs' experts have not explained how a particular chemical in fact caused a particular disease when each worker was exposed not only to a number of other chemicals at the Kelly-Springfield plant but also to various environmental factors with similar effects. As the Court noted in *Cavallo:* "*Daubert* commands that in court, science must do the speaking, not merely the scientist." 892 F.Supp. at 761; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1315-16 (9th Cir.1995). The failure of an expert to address alternative causes has been held to constitute an adequate ground for excluding the testimony of that expert. *Claar v. Burlington Northern R. Co.,* 29 F.3d 499, 502 (9th Cir.1994); *see also Reiff v. Convergent Technologies,* 957 F.Supp. 573, 583 (D.N.J.1997) (excluding expert testimony where the expert ignored or was unable to satisfactorily discount alternative causes and did little if anything to rule them out) (quoting *Diaz v. Johnson Matthey, Inc.,* 893 F.Supp. 358, 360 (D.N.J.1995)).

In the performance of its gatekeeping responsibility, this Court concludes that, insofar as the causation issue in this case is concerned, the affidavits of Dr. Lipsky and Dr. Caplan do not satisfy the reliability component of the *Daubert* test. The evidence in question must therefore be excluded. As a result of such exclusion, there is insufficient

evidence of causation in the record here to create a triable issue of fact for the jury. Plaintiffs' failure to satisfy the *Daubert* test provides an alternative ground for the Court's conclusion that defendant's motion for summary judgment must be granted.

VIII

Conclusion

For all the reasons stated, this Court has concluded that defendant's motion for summary judgment must be granted as to all claims of all plaintiffs asserted in these consolidated cases.[21] Judgment will therefore be entered in favor of defendant Goodyear in each of these sixty-six cases. An appropriate Order will be entered by the Court.

* * *

[21] Shortly before the scheduled hearing on defendant's motion for summary judgment, plaintiffs filed a motion to strike some of defendant's exhibits and a motion for clarification or reconsideration of the Court's earlier ruling on plaintiffs' previous motion to strike exhibits. These two motions lack merit, and both motions will be denied. Following its review of the documents in question, the Court is satisfied that all of the challenged exhibits are relevant and admissible and that they may properly be considered by the Court in ruling on defendant's motion for summary judgment.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 2, 2002

No. 00-2588
CA-92-3679
CA-90-181-S
CA-90-180-MJG
CA-90-179-MJG
CA-90-178-K
CA-90-177-S
CA-90-176-H
CA-90-175-S
CA-90-174
CA-90-173-MJG
CA-90-172-HAR
CA-90-171-S
CA-90-170
CA-90-169
CA-90-168-MJG
CA-90-167-HAR
CA-90-166-K
CA-90-165-S
CA-90-164-H
CA-90-163
CA-90-162-S
CA-90-161-HAR
CA-90-160-S
CA-90-159-S
CA-90-158-S
CA-90-157
CA-90-156-MJG
CA-90-155-HAR
CA-90-154-S
CA-90-153-S
CA-90-152-H

CA-90-151-MJG
CA-90-150
CA-90-149-MJG
CA-90-148-HAR
CA-90-147-S
CA-90-146
CA-90-145
CA-90-143-HAR
CA-90-142-K
CA-90-141-S
CA-90-140-H
CA-90-182-K
CA-90-809
CA-90-887-MJG
CA-90-2331-WN
CA-90-2339-WN
CA-91-953-HAR
CA-91-3369
CA-91-3370
CA-91-3371
CA-91-3372
CA-91-3373
CA-91-3374
CA-91-3375
CA-91-3376
CA-91-3377
CA-91-3378
CA-91-3379
CA-92-3680
CA-92-3681
CA-92-3682
CA-95-1910-MJG
CA-95-1988
CA-95-1989
CA-95-1990

JAMES R. ALDRIDGE, SR.; MARGARET ALDRIDGE; HARRY W. ATKINSON; LOIS V. ATKINSON; WESLEY B. BARTLETT; ANNA M. BARTLETT; LEONARD BEARD, SR.; THERESA BEARD; CARROLL E. BROADWATER; MARLENE BROADWATER; THOMAS HENRY BROWN; BETTYLOU BROWN; ESTON C. CHAMP; PAUL H. CORDIAL; EARLENE L. CORDIAL; STANLEY W. CORLEY; C. LOUISE CORLEY; DONALD A. D'ATRI; SHIRLEY D'ATRI; JEAN C. GLASS; RAYMOND L. HAINES; MARY CATHERINE HAINES; ERNEST M. HOLT; ANNA MYRTLE HOLT; JUNIOR A. HOTT; ROXALYN HOTT; CAROL G. HUFFMAN; ROBERT M. ISER; WANDA L. ISER; DONALD JOHNSON; MARY ELLEN JOHNSON; DONALD LARKE; JUDY LARKE; IRVIN E. LOWERY; ADA L. LOWERY; WILLIAM R. MCCOY; LOUISE T. MCCOY; GEORGE V. MCKENZIE; DOROTHY E. MCKENZIE; WILLIAM J. MCKENZIE; MARTHA MCKENZIE; JAMES B. MILLS; ANN LOUISE MILLS; ROBERT MITTER; MARY LOUISE MITTER; JOHN E. MONAHAN; M. CAROLYN MONAHAN; RUSSELL C. MORGAN; LOUISE MORGAN; ARTHUR L. NEDER; JUNE E. NEDER; EDITH G. NORRIS, individually and in her capacity as personal representative of the estate of the deceased, David P. Norris; JACK E. RITCHEY; HELEN J. RITCHEY; PAUL A. SHOOK; GENEVIEVE E. SHOOK; GERALD D. SIMMONS; BARBARA SIMMONS; WILLIAM R. SPENCER; ELVA P. SPENCER; JOSEPH R. TAYLOR; ANNA K. TAYLOR; RICHARD F. WEESE; HAZEL M. WEESE; RAYMOND E. VINCI; SHIRLEY R. VINCI; EARL A. WINTERS; BETTY M. WINTERS; WILLIAM P. ZIMMERMAN; PHYLLIS ZIMMERMAN; ROBERT W. HAISLIP, as Personal Representative of the estate of his father Robert W. Haislip; NELLIE MAE MILLER; BARBARA A. FRIDINGER, in her capacity as personal representative of the estate of the deceased, Percy R. Miller; RONALD E. PORTER; RUTH M. DAY; PHYLLIS R. FROST, in her capacity as personal

representative of the estate of Frank C. Day, deceased; MARY S. LANGHAM, individually and in her capacity as personal representative of the estate of George E. Langham, deceased; ELMER L. KROLL; DORIS R. KROLL; PRISCILLA TETER, individually and in her capacity as personal representative of the deceased, Brook Teter; MURIEL R. SCHRAMM, individually and in her capacity as personal representative of the estate of Calvin C. Schramm; JESSIE SIMMONS, individually and in her capacity as personal representative of the estate of the deceased, Leonard T. Simmons; KATHLEEN S. SIRBAUGH, in her capacity as personal representative of the estate of Arlan Eugene Sirbaugh, deceased; JACOB LOAR; SARAH J. LOAR; HARRY F. PIPER; GENEVIEVE PIPER; LEROY ROBERTSON; ETHEL H. ROBERTSON; ALBERT D. STEWART; BETTY STEWART; LOIS SCHADT; MILFORD G. WILSON; DOROTHY M. WILSON; EVELYN V. BUSER, individually and in her capacity as personal representative of the estate of Theodore U. Buser, deceased; VIOLET G. GRAY, individually and in her capacity as personal representative of the estate of Richard R. Gray, deceased; YOLAND T. TACCINO; THOMAS RODGER TACCINO, personal representative of the estate of Edmund Joseph Taccino, deceased; ANNA M. COLE, personal representative of the estate of Charles B. Cole, deceased; MARY KATHLEEN JENKINS, individually and in her capacity as personal representative of the estate of Richard Toll Jenkins, deceased; JEREMY EDWARD, Surviving minor grandchild of Richard Toll Jenkins, deceased to the use of Mary Kathleen Jenkins, surviving spouse of Richard Toll Jenkins, deceased; DONALD J. FOLK; ARTHUR C. TICHNELL; CARRIE A. TICHNELL; WANEDA C. BRIDGES, individually and in her capacity as personal representative of the estate of Nevin H. Bridges, deceased; GILBERT L. ZIMMERMAN; REBECCA ZIMMERMAN; LEROY E. GROSS; CAROL M. GROSS; LEONARD D. WHITE; GLADYS FAY WHITE; EUGENE L.

ZIMMERMAN, JR.; PHYLLIS M. ZIMMERMAN; WEBSTER BRUCE LONG, III; LEONA PHARES LONG; LOUIS E. SCHADT, JR.; TERRY TRESSLER; MARGARET TRESSLER, as Personal Representatives of the estate of Robert C. Huffman; RAYMOND L. CHAMP, as personal representative of the estate of Elsie Champ, deceased; CAROLYN A. WAGNER, as personal representative of the estate of Richard H. Glass, deceased; JEANE R. KENNELL, as personal representative of the estate of Richard H. Glass, deceased; LOIS J. SCHADT, as personal representative of the estate of Louis E. Schadt, deceased; CYNTHIA JANE COLLINS, as Personal Representative of the estates of Betty H. Stewart and Albert D. Stewart; VICKIE A. HEBB, as Personal Representative of the estates of Betty H. Stewart and Albert D. Stewart,

Plaintiffs-Appellants,

and

DAVID P. NORRIS; PERCY MILLER,

Plaintiffs,

v.

GOODYEAR TIRE & RUBBER COMPANY, INCORPORATED, an Ohio Corporation,

Defendant-Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en ban, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK

RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

* * *

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initialed.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

* * *

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead ot the discovery of admissible evidence.

* * *

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * *

Rule 33. Interrogatories to Parties

(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number

including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of rule 26(b)(2). Without leave of court or written stipulation, interrogators may not be served before the time specified in Rule 26(d).

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with

respect to any objection to or other failure to answer an interrogatory.

* * *

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data, compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation,

a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

* * *

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) **Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) **Motion.**

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

* * *

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall,

after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * *

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

* * *

RECORD NO. 00-2588

In the
United States Court of Appeals
For The Fourth Circuit

JAMES R. ALDRIDGE, SR. *et al.*,

Plaintiffs-Appellants,

v.

GOODYEAR TIRE & RUBBER COMPANY, INCORPORATED, an Ohio Corporation,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND NORTHERN DIVISION

APPELLANTS PETITION FOR REHEARING WITH PETITION FOR REHEARING *EN BANC*

(Filed Mar. 19, 2002)

Henry Eigles
ATTORNEY AT LAW
10729 Evening Wind Court
Columbia, Maryland
21044-2412
(410) 730-1195
Counsel for Appellants

Sylvan H. Sack
ATTORNEY AT LAW
27 Brightside Avenue
Baltimore, Maryland
21208
(410) 484-1484
Counsel for Appellants

* * *

CONCLUSION

Goodyear's attorneys have engaged in systemic fraud on the court and abused the federal judicial system to

foreclose discovery in this case so to cover up Goodyear's underlying fraud in the Kelly-Springfield plant, Cumberland, Maryland: deliberately withholding information from Workers, OSHA and EPA as to Workers' exposure to toxic chemicals that applicable federal law required to be disclosed.

The proceedings in the district court were an abject denial of due process of law. *Cf. Root Ref. Co. v. Univ. Oil Products, Inc.*, 169 F.2d 514 (3rd Cir. 1948), *cert. den.* 335 U.S. 912 (1948)

Although extensively briefed and discussed during oral argument on January 23, 2002, the panel had not addressed the foregoing issues and applicable law in the panel's decision of March 5, 2002, and incorrectly affirmed the district court's summary judgment in this case. Appellants are entitled to rulings on the issues raised.

Appellant's, accordingly, respectfully request that the Court grant Appellants' petition for rehearing en banc.

* * *